No. 04-312

Supreme Court, U.S.
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In The
Supreme Court of the United States

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a non-profit corporation, *et al.*,
Petitioners,

v.

TRIGON HEALTHCARE, INCORPORATED, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX A (VOL. I OF III) TO
PETITION FOR WRIT OF CERTIORARI

George P. McAndrews
Counsel of Record
Steven J. Hampton
Patrick J. Arnold, Jr.
Sharon Hwang
James P. Murphy
Peter J. McAndrews
Ronald A. Dicerbo
MCANDREWS, HELD & MALLOY, LTD.
34th Floor
500 West Madison Street
Chicago, IL 60661
(312) 775-8000

Thomas R. Daly
ODIN, FELDMAN, & PITTLEMAN, P.C.
9032 Lee Highway
Suite 1100
Fairfax, VA 22031
(703) 218-2100

William G. Shields
THORSEN & SCHER
3810 Augusta Ave.
Richmond, VA 23230
(804) 359-3000

Counsel for Petitioners

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS
Appendix A (Vol. I of III) to Petition

Page

Opinion of
The United States Court of Appeals
For the Fourth Circuit
entered May 6, 2004 ..... 1a

Opinion of
The United States District Court
For the Western District of Virginia
Abingdon Division
entered April 25, 2003 ..... 43a

Order of
The United States Court of Appeals
For the Fourth Circuit
Re: Denying Petition for Rehearing
and Rehearing En Banc
entered June 2, 2004 ..... 60a

Plaintiffs' Third Amended Complaint
dated January 8, 2002 ..... 62a

Answer and Affirmative Defenses of Defendants
Trigon Healthcare, Inc., Trigon Insurance Co.,
Trigon Administrators, Inc., Mid-South Insurance
Company and Trigon Health and Life Insurance
Company to Plaintiffs' Third Amended Complaint
dated January 17, 2002 ..... 117a

The Appropriateness of
Spinal Manipulation for Low Back Pain
undated 156a

Declaration of
Scott Haldeman, M.D., Ph.D., D.C.
undated 210a

Opinion of
The United States Supreme Court
Re: *Copperweld Corp., et al. v. Independence Tube Corp.*
dated June 19, 1984 ..... 305a

Opinion of
The United States Supreme Court
Re: *Allied Tube & Conduit Corp. v. Indian Head, Inc.*
dated June 13, 1988 ..... 363a

Opinion of
The United States Court of Appeals
For the Seventh Circuit
Re: *WILK, D.C., et al. v.*
AMERICAN MEDICAL ASSOCIATION, et al.
dated February 7, 1990 ..... 393a

TABLE OF CONTENTS
Appendix A (Vol. II of III) to Petition

Page

Columbia Business Law Review 1995
Re: *Exclusive Joint Ventures and Antitrust Policy*
undated.....449a

Temple Law Review 2000
Re: *Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decision*
undated.....619a

TABLE OF CONTENTS
Appendix A (Vol. III of III) to Petition

Page

Clinical Practice Guideline Number 14
Acute Lower Back Problems in Adults
undated 798a

Complementary Care: When Is It Appropriate? Who Will Provide It?
undated 1040a-i

TABLE OF CONTENTS
Appendix B to Petition

Page

Clinical Practice Guideline:
Acute Low Back Problems in Adults:
Assessment and Treatment
dated December, 1994 .....1041a

Study of Pain Relief Backs Chiropractors
dated December, 1994 .....1072a

Experts Push Low-Tech Care for Back Pain;
BACK: Simple Care Pushed
dated December, 1994 .....1073a

Government's approved RX for back pain:
Take a hike
dated December, 1994 .....1074a

Back Pain? You Can't Take It Lying Down Anymore
dated December, 1994 .....1075a

National Health Expenditures by Type of Service and
Source of Funds: Calendar Years 1960-2002
undated.....1077a

Clinical Practice Guideline:
Managing Low Back Problems in Adults
undated..... 1094ai

via

TABLE OF CONTENTS
Appendix C to Petition – Under Seal

Page

Managed Care Advisory Panel Meeting Minutes
dated October 25, 1995 ..... 1095a

Letter to
Craig N. Bash, M.D. from
J. Lawrence Colley, M.D.
Re: Trigon's Back Pain Algorithm
dated May 2, 1996 ..... 1103a

TABLE OF CONTENTS
Appendix D to Petition

Page

Third Corrected Expert Witness Statement on Economic Issues on Behalf of Plaintiffs American Chiropractic Association and Others Dated March 7, 2003 ..... 1105a

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

03-1675

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a nonprofit corporation; VIRGINIA CHIROPRACTIC ASSOCIATION, INCORPORATED; GEORGE W. CHIRIKINIAN, D.C.; DOUGLAS M. COX, D.C.; WILLIAM R. THEISIER, D.C.; JOHN C. WILLIS, D.C.; JERRY R. WILLIS, D.C.; SARAH ELIZABETH ALLEN; LANA KAY BALL; MARGARET BYRNE; ROGER DALTON; MARY SUE DEAN; HARVIE LEE FRENCH, JR.; PATRICIA HERMAN; CINDY LINKENHOKER; SANDRA PHILLIPPI; DARLENE REQUIZO; DAVID RUSSOTTO; GLORIA JEAN SMITH; LYNN D. WAGNER; ANDREA WALLACE; PATRICIA WHITTINGTON; BENIS D. WOOD; RICHARD D. WORLEY; DALE DUKE YONTZ; DOUGLAS F. AMBROSE; GEORGE C. MCCLELLAND; JAMES M. PORTER; LARRY L. STINE; WENDY HOLDEN WILLIS; STEVEN W. YATES; KEVIN J. WESTBY; GREGORY WALTER; JEFFERSON K. TEASS,

Plaintiffs-Appellants,

v.

TRIGON HEALTHCARE, INCORPORATED; TRIGON INSURANCE COMPANY; TRIGON ADMINISTRATORS; MID-SOUTH INSURANCE COMPANY; TRIGON HEALTH AND LIFE INSURANCE COMPANY,

Defendants-Appellees,

and

BLUE CROSS AND BLUE SHIELD ASSOCIATION,

Defendant.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon.
James P. Jones, District Judge.
(CA-00-113-1)

Argued: February 24, 2004

Decided: May 6, 2004

[ENTERED: MAY 6, 2004]

Before WILLIAMS and MICHAEL, Circuit Judges, and William D. QUARLES, Jr., United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Williams wrote the opinion, in which Judge Michael and Judge Quarles joined.

COUNSEL

ARGUED: George P. McAndrews, MCANDREWS, HELD & MALLOY, LTD., Chicago, Illinois, for Appellants. Howard Feller, Bryan Alan Fratkin, MCGUIREWOODS, L.L.P., Richmond, Virginia, for Appellees. **ON BRIEF:** Steven J. Hampton, Patrick J. Arnold, Jr., Peter J. McAndrews, Ronald A. Dicerbo, MCANDREWS, HELD & MALLOY, LTD., Chicago, Illinois; William G. Shields, THORSEN & SCHER, Richmond, Virginia, for Appellants.

OPINION

WILLIAMS, Circuit Judge:

In this appeal, we consider whether Trigon Healthcare, Virginia's largest for-profit health insurance company, and its affiliated companies (collectively, Trigon),[1] were engaged in an anticompetitive conspiracy with medical doctors and medical associations whose purpose was to harm chiropractors. American Chiropractic[2] filed this eight count complaint alleging violations of federal antitrust laws, the Racketeer Influenced and Corrupt Organizations Act (RICO), and various state laws, claiming that Trigon and the medical doctors and associations were engaged in a conspiracy that used Trigon's reimbursement policies and treatment guidelines to limit severely the flow of insurance dollars to chiropractors and steer those monies toward medical doctors. Trigon argues that no conspiracy exists, and that it implemented its coverage policies unilaterally based on market supply and demand. The district court agreed with Trigon, dismissing two counts of the complaint for failure to state a claim and disposing of the remaining counts by granting Trigon's motion for summary judgment. Although we apply different reasoning than the district court in
some areas, we affirm its disposition of the case in favor of Trigon.

I.

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[1] Trigon Healthcare was recently purchased by Anthem Healthcare, an Indiana based health insurance company. To be consistent with the district court's usage and the factual record developed below, we refer to the corporation as "Trigon."

[2] We refer to the appellants, the American Chiropractic Association, the Virginia Chiropractic Association, certain individual chiropractors and some patients of individual chiropractors, collectively as "American Chiropractic."

Trigon is a for-profit, publicly-traded health insurance company located in Virginia. Trigon's business consists of selling individual and group healthcare benefit plans to its subscribers. Generally, these healthcare benefit plans list the benefits and services covered by Trigon under the plan and describe any services that are excluded from the plan or are the subject of coverage limitations. Trigon makes a network of healthcare providers, including medical doctors, hospitals, pharmacies, chiropractors, and therapists, available to plan members to provide the services covered under the plan. Trigon creates this network of healthcare providers by entering into contracts with providers who are willing to abide by Trigon's terms and conditions, as set forth in Trigon's provider agreements. Simply put, "Trigon is essentially purchasing services from the healthcare providers who agree to become participating providers in Trigon's [provider] networks." (J.A. at 1344.) Trigon strives to offer "the best coverage at the lowest possible cost," and it endeavors to pay "the lowest possible price" to healthcare providers to ensure low-cost access for plan enrollees. (J.A. at 1597, 4579.)

Chiropractic medicine is "a non-pharmaceutical, nonsurgical system of health care based on the self-healing capacity of the body" with the aim of "removing irritants to the nervous system and restoring proper function" to the nervous system. *Dorland's Medical Illustrated Dictionary* 347 (30th ed. 2003). Chiropractic treatment most commonly involves spinal manipulations[3] to relieve musculoskeletal complaints. *Id.* Trigon has provided coverage for chiropractic services since the 1980's, and Trigon

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[3] Spinal manipulation is defined by the Agency for Health Care Policy and Research, a division of the U.S. Department of Health and Human Services, as "manual therapy in which loads are applied to the spine using short or long lever methods." (J.A. at 5507.)

"acknowledge[s] that chiropractic care has a health effect, a positive health effect when rendered appropriately." [4] (J.A. at 4186.)

Despite Trigon's coverage of chiropractic services, and the fact that chiropractic medicine is, as the district court noted, a "recognized branch of the healing arts," *see American Chiropractic Association v. Trigon Healthcare, Inc.*, 258 F. Supp. 2d 461, 463 (W.D. Va. 2003), there is a history of animus from medical doctors and insurers aimed at chiropractors. Beginning in 1962, the American Medical Association (AMA), aided by the National Association of Blue Shield Plans,[5] began a "lengthy, systematic, successful, and unlawful" national group boycott aimed at destroying chiropractic medicine. *Wilk v. Am. Medical Ass'n.*, 895 F.2d 352, 371 (7th Cir. 1990). As the Seventh Circuit explained:

> In 1963 the AMA formed its Committee on Quackery ("Committee"). The Committee worked diligently to eliminate chiropractic. A primary method to achieve this goal was to make it unethical for medical physicians to professionally associate with chiropractors. Under former Principle 3, it was unethical for

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[4] The use of chiropractors by Trigon's plan enrollees has increased substantially since Trigon began covering chiropractic care. For instance, in 1996 only 26,275 plan enrollees received spinal manipulation treatment from chiropractors, but that number jumped to 74,477 by 2001. The number of chiropractic providers in Trigon's network rose from 513 to 961 during the same time span, and now almost 90% of chiropractors in the Commonwealth of Virginia are in Trigon's provider network. In addition, the total amount of payments from Trigon to chiropractors rose from $12,380,737 in 1996 to $21,510,503 in 2001.

[5] This organization is now called Blue Cross & Blue Shield Association of America.

> medical physicians to associate with "unscientific practitioners." In 1966, the AMA's House of Delegates passed a resolution labelling chiropractic an unscientific cult.

Id. at 356.

Beginning in 1977, the AMA slowly began to phase out its boycott of chiropractors, and the Seventh Circuit adopted the *Wilk* district court's finding that the boycott became dormant in 1980 when Principle 3 was revised.[6] *Id.* at 356, 374. Although Trigon is a licensee of Blue Cross & Blue Shield Association of America, there is no record evidence connecting Trigon to this boycott.

American Chiropractic, however, asserts that medical doctors continue
to harbor animosity toward chiropractors and have entered into an anticompetitive conspiracy with Trigon to harm chiropractors. American Chiropractic contends that medical doctors and their medical associations have conspired with Trigon to limit the usage of chiropractors by Trigon's plan enrollees and to restrain severely the reimbursement paid to chiropractors for services rendered to plan enrollees. The ultimate goal of this conspiracy, American Chiropractic argues, is to shift insurance dollars away from chiropractors toward medical doctors and harm the business of chiropractors.

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[6] Although the Seventh Circuit recognized that the boycott ended in 1980, it affirmed a grant of injunctive relief against the American Medical Association because some of its actions in 1983 "indicated the AMA's likelihood of returning to its old (anti-chiropractic) ways." *Wilk v. Am. Medical Ass'n.*, 895 F.2d 352, 367 (7th Cir. 1990).

In response to this perceived anticompetitive conspiracy, American Chiropractic brought this action in the United States District Court for the Western District of Virginia on August 18, 2000. American Chiropractic's eight-count complaint alleged that Trigon[7] conspired with medical doctors and medical associations to restrain interstate trade in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C.A. § 1 (West 1997) (count one); attempted to monopolize the market for treatment of neuromusculoskeletal conditions in violation of § 2 of the Sherman Act, 15 U.S.C.A. § 2 (West 1997) (count two); engaged in a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. § 1962 (West 2000) (count three); tortiously interfered with the business enterprise of chiropractors in violations of state common law (count four); conspired to injure chiropractors in their trade or practice in violation of Va. Code Ann. § 18.2-499 (Michie 1996) (count five); committed state common law breach of contract (count six) and conspiracy (count seven); and violated Va. Code Ann. §§ 38.2-2203, 38.2-3408, 38.2-4221, and 38.2-4312(E) (Michie 2002), referred to as the Virginia insurance equality laws (count eight). The district court exercised supplemental jurisdiction over the state law claims pursuant to 28 U.S.C.A. § 1367 (West 1993).

Trigon moved to dismiss the complaint in its entirety on October 13, 2000. The district court, on July 19, 2001, granted that motion in part and dismissed American Chiropractic's RICO (count three) and Virginia insurance equality (count eight) claims for failure to state claims. The district court held that the RICO claim was preempted by

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[7] The complaint initially named Blue Cross & Blue Shield of America in addition to Trigon Healthcare, Inc. and its affiliated companies. Blue Cross & Blue Shield of America was voluntarily dismissed as a defendant by American Chiropractic.

the McCarran-Ferguson Act and that the Virginia insurance equality laws relied upon by American Chiropractic did not create private causes of action.

Following discovery, on August 13, 2002, Trigon filed a motion for summary judgment on the remaining counts in the complaint. American Chiropractic did not file a Rule 56(f) motion requesting further discovery, but it did contest Trigon's motion for summary judgment. After the benefit of oral argument, the district court, on April 25, 2003, granted Trigon's motion for summary judgment on the remaining counts. As to counts one, five, and seven, the district court found that the intracorporate immunity doctrine precluded any conspiracy between Trigon and the medical doctors that served on one of its committees, the Managed Care Advisory Panel, and that American Chiropractic had produced no other evidence of a conspiracy between Trigon and the medical doctors or medical associations. As to American Chiropractic's claim for monopolization (count two), the district court granted summary judgment because Trigon did not possess monopoly power in the relevant market. It also granted Trigon's motion for summary judgment as to American Chiropractic's state law claims for tortious interference (count four) and breach of contract (count six). American Chiropractic noted a timely appeal of the district court's rulings, and we have jurisdiction under 28 U.S.C.A. § 1291.

On appeal, American Chiropractic argues: (1) that the district court erred in holding the intracorporate immunity doctrine applies to this case; (2) that the district court erred in holding that there was insufficient evidence of a conspiracy between Trigon and the medical associations to withstand summary judgment; (3) that the district court erred in granting summary judgment on the tortious interference claim; (4) that the district court erred in dismissing the Virginia insurance equality claim; (5) that the

district court erred in dismissing the RICO claim as preempted by the McCarran-Ferguson Act; and (6) that the district court abused its discretion in conducting discovery.[8] We address each contention in turn.

II.

Counts One, Five, and Seven

(The Conspiracy Counts)

American Chiropractic first contends that the district court erred in finding that the intracorporate immunity doctrine barred the possibility of a conspiracy between Trigon and its Managed Care Advisory Panel (MCAP) and in granting summary judgment on American Chiropractic's claim under §1 of the Sherman Act and its state law conspiracy claims.[9] We review the grant of summary judgment de novo, viewing the facts in the light most favorable to the non-moving party. *See Figgie Int'l, Inc. v. Destileria Serralles, Inc.*, 190 F.3d 252, 255 (4th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

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[8] We note that American Chiropractic does not appeal the district court's grant of summary judgment on its § 2 Sherman Act claim (count two) or the state law breach of contract claim (count six).

[9] Because the state law conspiracy claims follow the same analysis as the § 1 claim, we do not address them separately. *See Va. Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 284 (4th Cir. 2002) (noting that the Virginia Civil Conspiracy Act does not create liability absent a violation of the federal antitrust laws); *Fox v. Deese*, 362 S.E.2d 699, 708 (Va. 1987) (adopting intracorporate immunity doctrine for Virginia conspiracy laws).

party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under its Section 1 claim, American Chiropractic alleged that Trigon and its MCAP, a committee established by Trigon, created false referral guidelines meant to limit the usage of chiropractors for the treatment of lower back pain and, accordingly, to keep insurance reimbursement monies away from chiropractors. Trigon established the MCAP, composed of six Trigon employees and nine independent medical doctors appointed by professional organizations,[10] to "obtain input and advice from medical doctors on clinical issues such as quality control initiatives." (J.A. at 1348.) The MCAP "was formed and appointed by officers and employees of Trigon." (J.A. at 1352.) Dr. Lawrence Colley, Trigon's Vice President for Corporate Medical Policy during the relevant time period, also served as a member of the MCAP. It is undisputed that the MCAP was never given information regarding specific payment policies and that it lacked any decisionmaking authority.

American Chiropractic points to the MCAP's approval, in October 1995, of Trigon's practice guideline, titled "Managing Low Back Problems in Adults" (the Low Back Guideline), as evidence of an anticompetitive conspiracy between the members of the MCAP and Trigon. (J.A. at 6119.) This Low Back Guideline was drafted as an informative practice guideline for physicians. The Guideline also did not bear any relation to Trigon's coverage and reimbursement policies.

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[10] These organizations include the Virginia Society of Internal Medicine, the Medical Society of Virginia, the American College of Physicians, the University of Virginia School of Medicine, the Eastern Virginia Medical School and other medical organizations.

(J.A. at 1539-40.) The Low Back Guideline was written by Trigon's employees, not the MCAP, and was issued in response to a lengthy study by the Agency for Health Care Policy and Research (AHCPR), a division of the U.S. Department of Health and Human Services.

The AHCPR study was titled "Acute Low Back Problems in Adults" and was accompanied by a reference guide for treating low back pain. The study recommended spinal manipulation "in place of medication or a shorter trial [of manipulation] if combined with NSAIDS"[11] for the treatment of low back pain. (J.A. at 5653.) The AHCPR study defined "manipulation" as "manual therapy in which loads are applied to the spine using short or long lever methods." (J.A. at 5507.) This definition of manipulation referred to the procedure rendered primarily by chiropractors, as opposed to medical doctors. One medical journal, the *Annals of Internal Medicine*, stated in July 1998 that "the [AHCPR] recently made history when it concluded that spinal manipulative treatment is the most effective and cost-effective treatment for acute low back pain." (J.A. at 4984.) American Chiropractic argues that this AHCPR study "was a boon to chiropractors and a setback for medical doctors." (Appellant's Br. at 22.)

Trigon intended its under ten page Low Back Guideline to be "a shortened and user-friendly format" of the over one-hundred and fifty page AHCPR study for health care providers. (J.A. at 1538.) The Low Back Guideline stated that it was "adapted from the [AHCPR] and . . . approved and endorsed by Trigon's Managed Care Advisory Panel." (J.A. at 6123.) The MCAP considered the Low Back Guideline, alongside two other practice guidelines, on October 25, 1995. During that meeting, one of

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[11] NSAIDs is an abbreviation for non-steroidal anti-inflammatory drugs such as aspirin and ibuprofen.

the medical doctors on the MCAP asked if the guidelines the MCAP was considering were meant to be referral guidelines. Dr. Colley told them that the guidelines were referral guidelines.[12] The MCAP then adopted and approved the Low Back Guideline without making or suggesting any changes to it.

American Chiropractic argues that the Low Back Guidelines are false and misleading in two principal ways. First, the Low Back Guideline provided that "[a] short trial of manipulation may be as effective as NSAIDs." (J.A. at 6120.) American Chiropractic contends that the AHCPR guideline stands for the proposition that manipulation is *more effective* than NSAIDs. Second, the Low Back Guideline did not define the term "manipulation." According to American Chiropractic, the absence of this definition meant that the Low Back Guideline deterred primary care physicians from referring patients to chiropractors because it failed to identify manipulation practiced by chiropractors as the specific type of manipulation recommended. Dr. Scott Haldeman, one of American Chiropractic's experts and a member of the AHCPR panel, opined that "[b]y omitting the AHCPR's definition of manipulation, Trigon and its Managed Care Advisory Panel materially altered the recommendations of the AHCPR." (J.A. at 5672.) Because of this omission, according to Dr. Haldeman, Trigon's guidelines would "deprive patients of the benefit from spinal manipulation as practiced by doctors of chiropractic, and . . . deprive doctors of chiropractic of the opportunity to treat those patients." (J.A. at 5672.)

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[12] It is unclear whether Dr. Colley was stating that the Low Back Guideline was a referral guideline, or if he was referencing one of the other guidelines before the Managed Care Advisory Panel. Because this fact does not affect our analysis on American Chiropractic's Section 1 claim, we will assume that Dr. Colley was referencing the Low Back Guideline.

The district court was not persuaded by American Chiropractic's argument, and held that, under the intracorporate immunity doctrine, Trigon was legally incapable of conspiring with the MCAP. Additionally, the district court then found that American Chiropractic had failed to adduce sufficient evidence of a conspiracy between Trigon and the medical associations who appointed individuals to the MCAP to survive summary judgment. On appeal, American Chiropractic argues that the intracorporate immunity doctrine does not apply, either because the medical doctors on the MCAP lacked a unity of interest with Trigon or because the independent personal stake exception to the doctrine should apply. American Chiropractic also contends that it has produced direct evidence of a conspiracy among Trigon and the medical doctors on the MCAP and the medical associations that appointed those doctors.

A.

We consider first American Chiropractic's argument that Trigon conspired with the medical doctors who served on the MCAP.[13] Section 1 of the Sherman Act provides, in relevant part, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C.A. § 1. Thus, to establish a § 1 violation, a plaintiff must show: "(1) a contract, combination or conspiracy; (2) that imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002). "It is incontestable that 'concerted action' in restraint of trade lies at the heart of a Sherman Act section 1 violation." *Va. Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 280 (4th Cir. 2002).

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[13] American Chiropractic did not argue that Trigon conspired with its own employees serving on the MCAP.

In other words, § 1 "does not reach conduct that is wholly unilateral." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (internal quotation marks omitted).

"Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities." *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991) (en banc). Thus,

> it is perfectly plain that an internal 'agreement' to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals.

Copperweld, 467 U.S. at 769. Moreover, "§ 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions." *Id.* at 770. "For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." *Id.* at 771. Accordingly, the Supreme Court has held that a parent and its wholly owned subsidiary are legally "incapable of conspiring with each other for purposes of § 1 of the Sherman Act." *Id.* at 777. The Court in *Copperweld* noted further that "a parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design'" so the law's concern with a sudden joining of independent interests is not present in such a case. *Id.* at 771 (emphasis added).

We have applied this "intracorporate immunity" doctrine articulated in *Copperweld* to hold that a hospital lacked the capacity to conspire with its peer review

committee for purposes of § 1. *See Oksanen*, 945 F.2d at 706.[14] The plaintiff in *Oksanen*, a doctor, contended that the hospital conspired with its peer review committee, composed of staff physicians at the hospital, to limit and then revoke his staff privileges. Although the hospital and its medical staff were "legally separate entities," we held that the intracorporate immunity doctrine applied, explaining that "we must examine the substance, rather than the form, of the relationship between the hospital and the medical staff during the peer review process." *Id.* at 703. We concluded that the hospital and the doctors on the peer review committee possessed a unity of interest: improving the quality of patient care. "Like a corporation delegating authority to its officers, the [hospital] delegated peer review decisionmaking in the first instance to the medical staff." *Id.* at 703. Thus, "[i]n effect, the medical staff was working as the [hospital's] agent." *Id.*; *see also Detrick v. Panalpina, Inc.*,108 F.3d 529, 544 (4th Cir. 1997) ("The intracorporate immunity doctrine provides that a conspiracy can not exist between the agents of a corporation and the corporation itself."); *ePlus Technology v. Aboud*, 313 F.3d 166, 179 (4th Cir. 2002) ("[A]cts of corporate agents are acts of the corporation itself, and corporate employees cannot conspire with each other or with the corporation."). Moreover, the hospital "retained ultimate responsibility for all of the hospital's credentialing decisions." *Oksanen*, 945 F.2d at 704. The hospital's "ultimate control over peer review decisions enable[d] it to employ peer review to pursue its interests." *Id.* Finally, we questioned whether hospitals possessed any economic motive for conspiring with some medical doctors

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[14] A lawsuit alleging a conspiracy between a hospital and its peer review committee currently would be barred under the Health Care Quality Improvement Act of 1986. 42 U.S.C.A. §§ 11101-11152 (West 1995 & Supp. 2003). That Act was passed after the filing of Oksanen's lawsuit and was not made retroactive to pending cases.

to exclude others from the staff: "[i]f a physician is qualified and does not disrupt the hospital's operations, it is in the hospital's interest to include, not exclude, that physician." *Id.*; *see also* P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 1471b (1999 Supp.).

We have continued to recognize the existence of one narrow exception to the intracorporate immunity doctrine — the independent personal stake exception. In *Greenville Pub. Co. v. Daily Reflector, Inc.*, 496 F.2d 391 (4th Cir. 1974), we held that an exception to the intracorporate immunity doctrine "may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective." *Id.* at 399. We declined an invitation to apply the exception in *Oksanen* because the peer review committee lacked the ability to bind the hospital. "If the officer cannot cause a restraint to be imposed and his firm would have taken the action anyway, then any independent interest is largely irrelevant to antitrust analysis." *Oksanen*, 945 F.2d at 705. Put differently, "[t]o give advice when asked by the decisionmaker is not equivalent to being the decisionmaker itself." *Pennsylvania Dental Ass'n. v. Medical Serv. Ass'n.*, 745 F.2d 248, 259 (3d Cir. 1984).

Applying this reasoning here, we agree with the district court that, under the intracorporate immunity doctrine, Trigon lacked the legal capacity to conspire with the medical doctors on the MCAP. American Chiropractic argues that because the medical doctors on the MCAP do not share a unity of interest with Trigon, the MCAP cannot be considered a corporate agent of Trigon. A similar argument was raised and rejected in *Oksanen*. There, the plaintiff had alleged that the medical doctors on the peer review committee did not have a unity of interest with the hospital because the medical doctors would act in their own best interest, not the best interest of the hospital. As mentioned above, we found that the medical doctors, in

their role as members of the peer review committee, had a unity of interest with the hospital: ensuring patient care. We believe that *Oksanen*'s reasoning is not only instructive but persuasive here.

American Chiropractic is undoubtedly correct that medical doctors and insurance companies do not, generally speaking, share a unity of interest. That, however, is not the correct inquiry in cases applying the intracorporate immunity doctrine. Instead, we look to whether the medical doctors, in their role as embers of the MCAP, share a unity of interest with Trigon that makes them corporate agents of Trigon. We believe that they do.

Because Trigon established the MCAP to offer input on clinical issues faced by Trigon, the individual medical doctors, in their role as members of the MCAP, shared the same interest as Trigon: addressing clinical issues in a manner that would best serve its consumers, the plan enrollees. The MCAP is without question a corporate agent of Trigon, chaired by a Trigon employee, and we believe that the intracorporate immunity doctrine applies to its actions. The decision to consult with doctors on the MCAP does not "represent the sudden joining of economic forces that section one is designed to deter and penalize." *Oksanen*, 945 F.2d at 703. By creating the MCAP, Trigon did not bring together independent economic forces. Instead, Trigon had "ultimate control" over the MCAP's actions and was able to employ the MCAP to pursue its interests. In fact, we are presented with even stronger reasons for applying the doctrine here than we were in *Oksanen* because, in *Oksanen*, the peer review committee and the hospital were legally distinct entities. The MCAP is not legally distinct from Trigon.

American Chiropractic's argument paints with too broad a brush, and would, in effect, undercut much of the rationale of the intracorporate immunity doctrine by focusing on form over substance. Penalizing "coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits." *Copperweld*, 467 U.S. at 771. "Far from being a competitor with [Trigon], the [MCAP] was in fact a natural component of [Trigon's] management structure. " *Oksanen*, 945 F.2d at 703.

Moreover, the independent personal stake exception does not apply because the MCAP did not have the power to bind Trigon; it only made non-binding recommendations and endorsed materials already composed by Trigon employees. In fact, the MCAP did not even recommend changes to the Low Back Guideline. While the MCAP's seal of approval was important to Trigon from a business perspective because it allowed Trigon to market various publications as approved by a panel of medical doctors, American Chiropractic has made no showing that the MCAP itself could rewrite any part of such a publication and make Trigon issue those rewritten publications. The ultimate decision as to the contents of any document before the MCAP always rested with Trigon, and, accordingly, the independent personal stake exception cannot apply. *See id.* at 705.

Thus, we agree with the district court that Trigon lacked the capacity to conspire, within the meaning of § 1, with its corporate agent, the MCAP or its members.

B.

American Chiropractic next argues, assuming that the MCAP did not conspire with Trigon, that the medical associations who placed their members on the MCAP conspired with Trigon to publish the allegedly misleading guidelines and to implement several coverage policies aimed at limiting the usage and reimbursement of chiropractic services. As discussed above, to establish a § 1 violation, a plaintiff must show: "(1) a contract, combination, or conspiracy, (2) that imposed an unreasonable restraint of trade." *Dickson*, 309 F.3d at 202. A plaintiff can offer direct or circumstantial evidence to prove concerted action. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 774 (1984). American Chiropractic argues on appeal that it provided direct evidence of this conspiracy, in the form of the minutes from the MCAP meeting where the MCAP approved the Low Back Guideline, and the Low Back Guideline itself. These minutes and the Low Back Guideline, American Chiropractic alleges, represent direct evidence of a conspiracy orchestrated between the medical associations and Trigon. Additionally, American Chiropractic argues that it presented direct evidence that Trigon and the medical associations conspired to implement two other coverage policies with the intent to harm chiropractors – a $500 cap on spinal manipulations and a reduced reimbursement rate for chiropractors and other limited license providers.

In 1988, Trigon instituted a $500 yearly reimbursement cap on spinal manipulations, regardless of "what type of provider renders the services." (J.A. at 5345.) Although this $500 reimbursement cap is facially neutral, in that it does not target a specific provider, neither side disputes that chiropractors are the main providers of spinal manipulations. One chiropractor testified that no other insurance company had a cap as harsh as Trigon's, and that a "majority" of insurance companies did not use a hard

coverage cap on spinal manipulations. (J.A. at 7900, 7903-04.) This $500 annual coverage limit on spinal manipulations has remained in place since 1988.

In 1996, Trigon lowered the reimbursement rate for limited-license practitioners,[15] including chiropractors, to 60% (from 70%) of that received by fully-licensed practitioners performing the same procedure. As explained by Trigon, "the marketplace for third party healthcare coverage is extremely competitive and our customers are extremely price sensitive," making the lower reimbursement rate "appropriate and reasonable." (J.A. at 4636, 6337.)

American Chiropractic argues that both of these policies resulted from a conspiracy between Trigon and the medical associations. The $500 annual cap, American Chiropractic asserts, was implemented with the purpose of limiting the utilization of chiropractic services, while the lower reimbursement rate was intended to shift insurance dollars from chiropractors to medical doctors. American Chiropractic argues that, because Trigon recognizes that chiropractic care is effective and inexpensive, policies like these that have an adverse effect on chiropractic care are direct evidence that Trigon is not making an independent economic judgment but rather conspiring to harm chiropractors.

"[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Direct evidence is extremely rare in antitrust cases and is usually referred to as the "smoking gun." *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir.

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[15] Limited-license providers are defined by Trigon to include chiropractors, speech therapists, occupational therapists and physical therapists.

2003). We agree with the Third Circuit that direct evidence in this context is "explicit and requires no inferences to establish the proposition or conclusion being asserted." *Id.* (quotation marks omitted); *see United Mine Workers of Am. v. Pennington*, 381 U.S. 676, 720 (1965) (Goldberg, J., dissenting) ("Only rarely will there be direct evidence of an express agreement" in conspiracy cases). American Chiropractic's offering falls far short of this standard. At most, the MCAP meeting shows contact between two independent economic actors, but "mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence [of] an anticompetitive conspiracy." *Cooper v. Forsyth County Hosp. Auth.*, 789 F.2d 278, 281 (4th Cir. 1986). The two coverage policies are also not direct evidence of a conspiracy because both require the rather large inferential leap that Trigon drafted and implemented the policies only after reaching an agreement with medical doctors and associations.

Furthermore, as the district court explained,[16] American Chiropractic has not entered sufficient indirect evidence of a conspiracy to harm chiropractors. It is undisputed that use of chiropractic treatment by Trigon subscribers has substantially increased since the Low Back Guideline was issued in 1996. *See supra* note 4. Since 1996, the amount of money paid to chiropractors by Trigon has also risen substantially, from approximately $12 million dollars to over $21 million in 2001. The reimbursement policies about which American Chiropractic complains are facially neutral policies that admittedly have an effect on chiropractors. There is, however, no evidence of an effort by

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[16] American Chiropractic also limited its arguments to direct evidence of a conspiracy before the district court, but that court found that American Chiropractic offered no direct evidence of a conspiracy and instead analyzed whether there was circumstantial evidence of a conspiracy.

Trigon to harm chiropractors apart from these facially neutral reimbursement policies and the Low Back Guideline, and, more importantly, American Chiropractic has failed to show that either the reimbursement policies or the Low Back Guideline was the result of an antitrust *conspiracy*. They have pointed to no evidence that Trigon conspired with any entity in forming its policies. In fact, the only evidence in the record is that all of the actions in dispute were taken unilaterally by Trigon employees. In the face of Trigon's affidavits that it acted unilaterally, American Chiropractic needed more to create a genuine issue of material fact.

Moreover, American Chiropractic has not explained why Trigon would, as an economic matter, attempt to exclude chiropractors from its provider network or dissuade patients from the use of chiropractic services if chiropractic care is more cost-effective than other medical care. As the district court ably explained, *see Trigon Healthcare*, 258 F. Supp. 2d at 466-67, this alleged conspiracy does not make economic sense from Trigon's perspective. We agree with the district court that, "as a profit-seeking corporation, [Trigon] had no economic motive to prevent referrals to chiropractors." *Id.* at 466.

Accordingly, we affirm the district court's grant of summary judgment on American Chiropractic's claim under § 1 of the Sherman Act (count one) and its state law conspiracy claims (counts five and seven).[17]

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[17] Because we find that American Chiropractic failed to prove the existence of an anticompetitive conspiracy, we do not consider whether American Chiropractic entered sufficient evidence that Trigon and the medical associations and medical doctors implemented unreasonable restraints on trade.

III.

Count Four

(Tortious Interference)

American Chiropractic next challenges the grant of summary judgment in favor of Trigon on its state law claim for tortious interference. We review the grant of summary judgment de novo. *Figgie Int'l*, 190 F.3d at 255. Virginia law permits recovery for such claims where a party can show "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) the defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy; and (4) damages to plaintiff." *Commercial Bus. Sys., Inc. v. Halifax Corp.*, 484 S.E.2d 892, 896 (Va. 1997) (quotation marks omitted). "[P]roof of the existence of the first and third elements of the tort must meet an objective test," and "mere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate to sustain the cause of action." *Id.* at 897. Instead, a plaintiff must "establish a *probability* of future economic benefit, not a mere possibility." *Id.* (emphasis added). When a plaintiff is alleging that a third party has interfered with a business expectancy rather than with an actual contract, the plaintiff must "show that the defendant interfered by employing improper methods." *Peterson v. Cooley*, 142 F.3d 181, 186 (4th Cir. 1998). Improper methods are "those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules." *Duggin v. Adams*, 360 S.E.2d 832, 836 (Va. 1987).

Under this count, American Chiropractic argues that the $500 annual coverage cap on spinal manipulations tortiously interfered with the chiropractors' business expectancy that their patients would continue to seek treatment from them. This argument fails because American Chiropractic has not shown a business expectancy with a probability of future economic benefit. Virginia law requires objective proof of a probability of future economic benefit, not just a hope or a belief that a business relationship will continue. American Chiropractic admitted that patients have the ability and the right to terminate their relationship at any time, and it has not introduced any evidence showing more than a hope or belief that, generally speaking, patients would continue seeking treatment from chiropractors. The chiropractors never had written contracts with their patients, and some patients unilaterally terminated their treatment relationships with the chiropractors. Because American Chiropractic failed to show that it has an objective, valid business expectancy with a probability of future economic benefit, the district court was correct to grant summary judgment to Trigon on this count.[18]

IV.

Count Eight

(Virginia Insurance Equality Statutes)

American Chiropractic also argues that the district court erred in dismissing its claim under the Virginia insurance equality laws for failure to state a claim. We

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[18] Because we conclude that American Chiropractic lacked a valid business expectancy, we do not address the district court's alternative ground for granting summary on this claim – that Trigon did not use improper means in interfering with the chiropractors' alleged business expectancy.

review the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) de novo. *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (4th Cir. 1999). On appeal from an order granting a Rule 12(b)(6) motion to dismiss, this court accepts as true the facts as alleged in the complaint, views them in the light most favorable to the plaintiff, and recognizes that dismissal is inappropriate "unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 n.4 (4th Cir. 1993); *see Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (explaining that dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations").

In its complaint, American Chiropractic alleged that Trigon violated Virginia's insurance equality laws, found in Va. Code Ann. §§ 38.2-2203, 38.2-3408, 38.2-4221, and 38.2-4312(E), because Trigon implemented reimbursement and utilization restrictions targeted only at chiropractors, not medical doctors. The district court found that none of these statutory provisions created private rights of action on their face and declined to read a private right of action into the sections.

As a preliminary note, §§ 38.2-2203, 38.2-4221 and 38.2-4312 do not apply to Trigon's business, so American Chiropractic cannot state a claim under those code sections. Section 38.2-2203 deals with "bodily injury liability insurance"; § 38.2-4221 applies to non-stock corporations; and § 38.2-4312(E) applies to health maintenance organizations. Trigon is a for-profit stock corporation that operates in the field of accident and sickness insurance. Thus, by their clear terms, these statutory provisions do not apply to Trigon's business decisions.

The issue is thus, whether § 38.2-3408, which applies to accident and sickness insurance companies, creates a private cause of action. For the following reasons, we hold that Virginia would not recognize a private cause of action under this code section. The section reads, in relevant part, "[i]f an accident and sickness insurance policy provides reimbursement for any service that may be legally performed by a person licensed in this Commonwealth as a chiropractor . . . reimbursement under the policy shall not be denied because the service is rendered by the licensed practitioner." Va. Code Ann. § 38.2-3408. The code section itself does not include an enforcement mechanism, but § 38.2-200 explains that the "[State Corporation] Commission is charged with the execution of all laws relating to insurance and insurers." Va. Code Ann. § 38.2-200. Section 38.2-221 grants the Commission the power to levy and enforce penalties against insurers for violations of the insurance code. Va. Code Ann. § 38.2-221. That section, however, also states that the "power and authority conferred upon the Commission by this section shall be in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose civil penalties for violations of the laws of this Commonwealth." Va. Code Ann. § 38.2-221.

We have previously stated that "federal courts should be reluctant to read private rights of action into state laws where state courts and state legislatures have not done so. Without clear and specific evidence of legislative intent, the creation of a private right of action by a federal court abrogates both the prerogatives of the political branches and the obvious authority of states to sculpt the content of state law." *A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 674 (4th Cir. 1986). Applying this test, we held that the Virginia Unfair Trade Practices Act (UTPA) did not create a private cause of action because it lacked explicit language creating such an action. The Virginia UTPA

contained a statutory provision similar to § 38.2-221,[19] and we explained that it "[did] not create any new rights of action but instead preserve[d] any existing right of action that an injured person may have against a wrongdoer." *Id.* at 674 n.5. We have found no Virginia cases since *A & E Supply* that call this understanding into question.

Like the Virginia UTPA, § 38.2-3408 does not create a private right of action because it does not contain any specific statutory language creating such an action. The existence of § 38.2-221 does not evince a legislative intent to create private rights of action under the insurance code. Rather, as we explained in *A & E Supply*, that statutory provision only leaves in place pre-existing statutory and common-law rights of action.

Accordingly, the district court was correct in dismissing American Chiropractic's claim under the Virginia insurance equality laws.

~~V.~~

Count Three

(RICO)

American Chiropractic's final contention of error relating to the substantive holdings of the district court is that the district court erred in finding that its RICO claim was preempted by the McCarran-Ferguson Act and

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[19] The provision at issue in *A & E Supply* read that "no order of the Commission under this article shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this Commonwealth." *A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 674 n.5 (4th Cir. 1986) (quoting Va. Code Ann. § 38.1-57.1)).

dismissing that claim pursuant to Rule 12(b)(6).[20] As stated above, we review de novo a complaint for failure to state a claim and "take all allegations as admitted and examine whether the plaintiff can prove any set of facts that would entitle him to relief." *Anderson v. Found. for Advancement, Educ. and Employment of Am. Indians*, 155 F.3d 500, 505 (4th Cir. 1998). "Federal 'notice' pleading standards require that the complaint be read liberally in favor of the plaintiff." *Id.* For the reasons that follow, we agree that American Chiropractic's claim is not preempted by the McCarran-Ferguson Act, but nonetheless affirm the district court's dismissal of this count because American Chiropractic failed to allege a claim for mail fraud or wire fraud and, accordingly, failed to state a claim for a RICO violation.

A.

The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C.A. § 1012(b) (West 1997). The McCarran-Ferguson Act does not apply to federal laws that are specifically targeted at the business of insurance. *Id.* Trigon argues that applying RICO to American Chiropractic's claims would invalidate, impair or supersede Virginia's insurance code, found at Title 38.2 of the Code of Virginia. For a federal law to be preempted by McCarran-Ferguson: (1) the state law in question must be enacted for the purpose of regulating the business of insurance; (2) the federal law must not be specifically related to the business of insurance; and (3) the federal law must invalidate, impair or supersede the state law in question. *Humana, Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). The second

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[20] As discussed *infra*, in its RICO claim, American Chiropractic alleged that Trigon engaged in a pattern of racketeering activity including mail fraud, wire fraud, and extortion.

factor is easily satisfied because the Supreme Court has held that "RICO is not a law that specifically relates to the business of insurance." *Humana*, 525 U.S. at 307 (quotation marks omitted). Thus, we are left to decide whether Title 38.2 is a law enacted for the purpose of regulating the business of insurance and, if so, whether RICO impairs, invalidates or supersedes its operation.

We have little difficulty concluding that Title 38.2 is a set of laws enacted for the purpose of regulating the business of insurance. The Supreme Court has stated that "[s]tatutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly are laws regulating the 'business of insurance.'" *SEC v. Nat'l Securities, Inc.*, 393 U.S. 453, 460 (1969). "[T]he focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders . . . ." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993). Accordingly, the McCarran-Ferguson Act encompasses "laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Id.* at 505. Applying these standards, Title 38.2 of the Code of Virginia, specifically §§ 38.2-200, 38.2-221 and 38.2-3408 at issue here, is a set of laws enacted for the purpose of regulating the business of insurance. Title 38.2 is limited to insurance companies and creates a comprehensive network of statutory provisions aimed at controlling and managing the business of insurance. For instance, § 38.2-3408, by requiring insurers to provide reimbursement for all providers of covered services, helps to manage the relationship between the policyholder and the insurance company by ensuring that if a particular service is covered by an insurance company, the policyholder can seek treatment from any provider able to perform that service.

Accordingly, we next must decide whether allowing a RICO claim to proceed against an insurance company would "invalidate, impair, or supersede" Virginia's insurance code. The Supreme Court recently considered a similar question: whether RICO invalidated, impaired or superseded Nevada's laws regulating insurance. *Humana*, 525 U.S. at 307. In *Humana*, the Court defined "invalidate" as "to render ineffective, generally without providing a replacement rule or law," and "supersede" as "to displace (and thus render ineffective) while providing a substitute rule." *Id.* Using these definitions, it is clear that, as in *Humana*, RICO's application would neither "invalidate" nor "supersede" Virginia law.[21]

Thus, the key question, as in *Humana*, is whether RICO's application to Trigon's alleged conduct would "impair" Virginia's law. In holding that RICO did not impair Nevada's law, the Supreme Court stated that

> When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.

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[21] The district court relied heavily on *Ambrose v. Blue Cross & Blue Shield of Va., Inc.*, 891 F. Supp. 1153 (E.D. Va. 1995), *aff'd* 95 F.3d 41 (4th Cir. 1996) (unpublished per curiam opinion). Because *Ambrose* was decided before the Supreme Court's decision in *Humana, Inc. v. Forsyth*, 525 U.S. 299 (1999), and because the district court in *Ambrose* applied different definitions for the statutory terms than did the *Humana* Court, that decision is not helpful to our decision today.

Id. at 310. The only difference between the Nevada laws considered in *Humana* and the Virginia laws at issue in this case is that the Nevada laws explicitly provided for a private right of action, whereas the Virginia laws, as discussed *supra*, Part IV, do not. The district court found this difference dispositive, holding that application of RICO would convert Virginia's system of public redress into a federal system of private redress and thus that RICO would impair, invalidate, and supersede Virginia law. *Am. Chiropractic Ass'n*, 258 F. Supp. 2d at 735. We disagree.

Instead, we agree with the Tenth Circuit's resolution of this issue in *Bancoklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089 (10th Cir. 1999). The Missouri insurance laws at issue in that case, like the Virginia insurance laws at issue here, did not provide for a private right of action. The court nonetheless concluded that *Humana* compelled a holding that the RICO claims were not barred by the McCarran-Ferguson Act. *Id.* at 1099. The court held

> RICO "advances" Missouri's "interest in combating insurance fraud" and "does not frustrate any articulated [Missouri] policy." Although Missouri does not provide a private cause of action under its [insurance laws], it does allow causes of action under other state law. *See* Mo. Rev. Stat. § 375.944(4) (1991). Therefore, the McCarran-Ferguson Act does not bar [the] RICO claims.

Id. (quoting *Humana*, 525 U.S. at 314); *see also Humana*, 525 U.S. at 312 ("Moreover, the [Nevada] Act is not hermetically sealed; it does not exclude application of other state laws, statutory or decisional."); *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185 (3d Cir. 1998) (holding that RICO does not impair a state insurance law that permits private rights of action under other state laws). *But see LaBarre v. Credit*

Acceptance Corp., 175 F.3d 640 (8th Cir. 1999) (holding that the lack of a private right of action in the state insurance laws was dispositive without considering whether the statute at issue permitted the application of other state laws to the conduct of insurers).

RICO furthers Virginia's interest in policing insurance fraud and misconduct and does not frustrate any declared state policy. Although RICO's damage provisions are admittedly more severe than many state laws, RICO does not interfere with Virginia's administrative scheme. Moreover, as discussed in Part IV, although Virginia's insurance laws do not create private rights of action, § 38.2-221 allows for other state laws to apply to the conduct of insurers.[22] Va. Code Ann. § 38.2-221 (The "power and authority conferred upon the Commission by this section shall be in addition to and not in substitution for the power and authority conferred upon the courts by general law to impose ~~civil~~ penalties for violations of the laws of this Commonwealth."). We agree with the Tenth Circuit that in such a situation, *Humana* compels a conclusion that American Chiropractic's RICO claim was not barred by the McCarran-Ferguson Act.

B.

Although we disagree with the reasoning of the district court, we can affirm the dismissal of the complaint "on any basis fairly supported by the record." *Eisenberg v. Wachovia Bank, N.H.*, 301 F.3d 220, 222 (4th Cir. 2002). Perhaps anticipating our conclusion in Part V.A., Trigon has argued in the alternative that we should affirm the 12(b)(6)

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[22] For example, in this case American Chiropractic asserted state law claims for tortious interference with a business relationship, common law and statutory conspiracy, and breach of contract.

dismissal of the RICO claim because American Chiropractic has failed to state a claim under RICO. RICO provides, in pertinent part, that "[i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income . . . [in] the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C.A. § 1962(a). "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C.A. § 1964(c).

A plaintiff bringing a civil RICO action under § 1964(c) must adequately plead at least two predicate acts of racketeering that form a "pattern of racketeering." 18 U.S.C.A. § 1961(5). Private civil RICO suits may be brought regardless of whether the government chooses to prosecute the criminal RICO violation. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985). Here, American Chiropractic's complaint stated that Trigon committed mail fraud, wire fraud, and extortion.[23] All three qualify as "racketeering activity," *see* 18 U.S.C.A. § 1961(1), but Trigon contends that American Chiropractic cannot state a claim for any of those predicate acts.

We consider first the alleged mail and wire fraud. The federal mail and wire fraud statutes prohibit the use of the mails or interstate wires in furtherance of schemes to defraud. 18 U.S.C.A. §§ 1341, 1343 (West 2000). For the

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[23] American Chiropractic also alleged the predicate act of securities fraud in its complaint, but it did not pursue that claim because Trigon previously had not been convicted of securities fraud, as required by 18 U.S.C.A. § 1964(c) (West 2000).

government to obtain a conviction for mail or wire fraud it must prove (1) a scheme disclosing an intent to defraud; and (2) the use, respectively, of the mails or interstate wires in furtherance of the scheme. *See Chisolm v. Transouth Fin. Corp.*, 95 F.3d 331, 336 (4th Cir. 1996). In a prosecution for mail or wire fraud, the government is not required to show reliance on any misrepresentation.

To recover civil RICO damages, however, an individual must also allege that he was injured "by reason of" the pattern of racketeering activity. *Id.*; *see also* 18 U.S.C.A. § 1964(c). To meet this burden with respect to mail fraud and wire fraud, a plaintiff must "*plausibly* allege both that [he] detrimentally relied in some way on the fraudulent mailing [or wire] . . . and that the mailing [or wire] was a proximate cause of the alleged injury to [his] business or property." *Chisolm*, 95 F.3d at 337 (emphasis added). The alleged fraud "must be a 'classic' one[,] . . . the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." *Id.* American Chiropractic's complaint states that Trigon committed mail and wire fraud by representing, in its "Ancillary Professional Provider Agreement," that it reimburses healthcare providers pursuant to the Federal Resource Based Relative Value Scale (RBRVS).[24] The complaint stated that chiropractors justifiably relied upon this alleged misrepresentation in deciding to enter into provider agreements with Trigon and that the chiropractors were injured because Trigon does not, in fact, reimburse chiropractic services pursuant to the

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[24] The RBRVS is the relative value scale used by Medicare in setting its reimbursement rates for providers under that program..

RBRVS.[25] Trigon entered the Ancillary Professional Provider Agreement in full to support its motion to dismiss.

Although as a general rule extrinsic evidence should not be considered at the 12(b)(6) stage, we have held that when a defendant attaches a document to its motion to dismiss, "a court may consider it in determining whether to dismiss the complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity." *Phillips v. LCI Int'l Inc.*, 190 F.3d 609, 618 (4th Cir. 1999); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir.1998). As the Third Circuit has explained

> The rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint—lack of notice to the plaintiff—is dissipated "[w]here plaintiff has actual notice . . . and has relied upon these documents in framing the complaint." What the rule seeks to prevent is the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent.

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[25] At oral argument before this court, counsel for American Chiropractic also alleged that Trigon committed mail fraud by telling its plan enrollees that healthcare providers were reimbursed in accordance with Medicare rates. The district court previously had held that American Chiropractic lacked standing to advance the claims of individual patients, and American Chiropractic did not appeal that ruling. Thus, the argument that Trigon committed mail fraud against its enrollees is not properly before this court.

In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1426 (3d Cir. 1997) (quotation marks omitted).

As stated above, American Chiropractic explicitly referred to the Ancillary Professional Provider Agreement, and its mail and wire fraud claims are based on the alleged misrepresentation made in that document. In addition, American Chiropractic does not contest the authenticity of the documents. Accordingly, we can consider those documents at the 12(b)(6) stage of the litigation. The Ancillary Professional Provider Agreement states, in part, that "[m]ost Trigon fees are based upon external benchmarks of relative value, for example, the [RBRVS]." (J.A. at 156.) Thus, American Chiropractic alleges, Trigon has misled chiropractors into believing that their reimbursement would be based upon Medicare's reimbursement system. In full, however, the Ancillary Professional Provider Agreement states that

> *Trigon's fee schedules represent the maximum Allowable Charge for each covered service that corresponds to a single service code.* The preponderance of valid service codes [are] from Current Procedural Terminology (CPT), HCFA Common Procedural Coding System (HCPCS), American Dental Association (ADA), or National Drug Codes (NDC). For *covered services represented by a single code, the maximum Allowable Charge is the fee schedule amount determined by Trigon in its sole discretion* or your usual charge for the service, whichever is less. *Most Trigon fees are based upon external benchmarks* or relative value, for example, the Federal Resource Based Relative Value Scale (RBRVS), Average Wholesale Price (AWP), American Society of Anesthesiologists (ASA), relative value and

> Medicare's laboratory and Durable Medical Equipment (DME) fees.

(J.A. at 156 (footnote omitted) (emphases added).)

The Agreement comes with Trigon's fee schedule attached. Relevant here, Trigon's fee schedule includes the maximum allowable charge for the four service codes associated with spinal manipulations. The fee schedule discloses that Trigon reimburses providers who perform spinal manipulations the same amount regardless of how many "regions" of the spine are manipulated. The RBRVS, however, provides a higher reimbursement when more spinal regions are manipulated. It is undisputed that Trigon began this reimbursement practice in 1997.

We conclude that American Chiropractic, as a matter of law, could not justifiably rely on the statement that "most" Trigon fees are based on the RBRVS for two reasons. First, the statement only provides that "*most*" fees are based on the external benchmark of the RBRVS. The term "most" indicates that some of Trigon's reimbursement payments were not based upon the RBRVS. Second, the remainder of the document clearly explains that Trigon's fee schedule represents the maximum allowable charge for a service. Moreover, the fee schedule discloses that Trigon does not follow the RBRVS when reimbursing for spinal manipulations. Because the fee schedule discloses that Trigon does not reimburse for spinal manipulation services according to the RBRVS, American Chiropractic could not have justifiably relied on Trigon's alleged misrepresentation that most of Trigon's fees were based on the RBRVS. Accordingly, American Chiropractic has failed to plausibly allege that it justifiably relied on a misrepresentation by Trigon.

To withstand a motion to dismiss for failure to state a RICO claim, a plaintiff must plausibly allege at least two predicate acts of racketeering. As noted above, American Chiropractic's complaint alleged three predicate acts – mail fraud, wire fraud, and extortion. Because we have held that American Chiropractic failed to state a claim for mail or wire fraud, it has failed to allege at least two predicate acts of racketeering, and we need not address whether it properly alleged a claim of extortion.

Although, in light of *Humana, Inc v. Forsyth*, American Chiropractic's claim is not preempted by the McCarran-Ferguson Act, we affirm the dismissal of this count because American Chiropractic failed to state a claim for a RICO violation.

VI.

Finally, American Chiropractic argues that the district court abused its discretion in handling discovery in this case by refusing to extend the temporal scope of discovery to include events prior to 1996 and by failing to lengthen discovery after Trigon turned over documents relating to the MCAP in a tardy manner.[26] "We afford substantial discretion to a district court in managing

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[26] American Chiropractic raises four other arguments relating to the conduct of discovery. Those arguments are that the district court abused its discretion by: (1) failing to require Trigon to produce the identity of all medical doctors employed by Trigon; (2) refusing to compel Trigon to turn over information regarding any service code that paid a lower reimbursement amount to limited-license practitioners than to medical doctors; (3) by refusing to compel Trigon to turn over more of Dr. Colley's file; and (4) by refusing to allow American Chiropractic to conduct another Rule 30(b)(6) deposition. We have examined these issues carefully and conclude that they are without merit; thus, we affirm those rulings as well.

discovery and review discovery rulings only for abuse of that discretion." *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 1929 (2003).

Discovery commenced in September 2001, soon after the district court addressed Trigon's motion to dismiss, and the parties agreed in writing to limit discovery requests to events occurring after January 1, 1996.[27] Discovery lasted ten months, concluding on June 28, 2002. On June 14, 2002, just prior to the close of discovery, Trigon turned over documents relating to Dr. Colley and his involvement with the MCAP. Trigon admitted that despite its efforts to locate the documents, they had been "overlooked" and offered to cure the late production by allowing American Chiropractic to depose Dr. Colley after the stated discovery deadline passed. Trigon also permitted American Chiropractic to depose two representatives of medical societies with members on the MCAP after the close of discovery.

American Chiropractic's first assertion is that the district court abused its discretion by limiting the scope of discoverable materials to those created after January 1, 1996. By doing so, American Chiropractic contends, the district court rendered American Chiropractic unable to pursue key avenues of investigation in the case, including the $500 coverage cap instituted in 1988 and the MCAP meeting from October of 1995 where the Low Back Guideline was approved. Unfortunately for American Chiropractic, this limitation was imposed not by judicial fiat, but by the mutual agreement of the parties. The record shows that American Chiropractic and Trigon agreed, in writing, to limit discovery to events arising after January 1, 1996 unless,

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[27] The parties agreed that this time limit could be revised by negotiations in good faith if American Chiropractic could show a valid basis for requesting additional information.

in good faith, a more expansive time period was necessary. American Chiropractic failed to contact Trigon to discuss expanding the time period and did not mention the limiting nature of the agreement to the district court until June 18, 2002, a mere ten days before the close of discovery. The district court found that expanding the time period to events before January 1, 1996, would be "overly burdensome" to Trigon and refused American Chiropractic's invitation to do so. (J.A. at 1137.) We cannot say the district court abused its discretion by refusing, at such a late date, to expand the scope of discovery beyond that mutually agreed to by the parties.

Next, American Chiropractic contends that the district court abused its discretion by refusing to extend the end-date of discovery when Trigon turned over documents relating to the Low Back Guideline and the MCAP's October 25, 1995 meeting just before the close of discovery. Trigon does not dispute that it was dilatory in turning over those particular documents; in a letter to American Chiropractic, it admitted that "despite Trigon's good faith efforts to produce all of the relevant documents, these documents were not found and were overlooked during the previous document productions. This was admittedly a mistake by Trigon." (J.A. at 5296.) Despite this admitted mistake, the district court denied American Chiropractic's request for more discovery and found that "any mistakes on Trigon's part have not caused prejudice." (J.A. at 1131.)

While we are not sure that Trigon's late production of these documents did not have the potential to cause prejudice, two factors lead us to conclude that the district court did not abuse its discretion in refusing to extend discovery. First, Trigon offered to cure the late production by allowing American Chiropractic to conduct an additional deposition of Dr. Colley after the close of discovery. Second, Trigon allowed American Chiropractic to take depositions

of two of the medical societies with members on the MCAP after the close of discovery as well.

Additionally, if American Chiropractic felt that it had insufficient time to conduct discovery given the late production of documents, and/or that Trigon was not negotiating in good faith an agreement for further discovery, it could have filed a Rule 56(f) motion in response to Trigon's motion for summary judgment.[28] We have held that "[i]f a party believes that more discovery is necessary for it to demonstrate a genuine issue of material fact, the proper course is to file a Rule 56(f) affidavit." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002). This American Chiropractic did not do. In sum, we find that the district court did not abuse its discretion in its discovery rulings.

VII.

In conclusion, we affirm the district court's grant of summary judgment on American Chiropractic's § 1 Sherman Act claim, Virginia civil and common law conspiracy claims, and tortious interference claim. We also affirm the district court's dismissal of American Chiropractic's claim under the Virginia insurance equality laws for failure to state a claim. Although we disagree with the district court's holding that American Chiropractic's RICO claim is preempted by the McCarran-Ferguson Act, we affirm the district court's dismissal of that claim because American Chiropractic has failed to state a claim for a RICO

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[28] Federal Rule of Civil Procedure 56(f) provides that "[s]hould it appear from the affidavits of a party opposing [a summary judgment] motion that the party cannot for reasons stated present by affidavits facts essential to justify the party's opposition, the court may . . . order a continuance to permit . . . discovery to be had."

violation. We also find that the district court's discovery rulings were not an abuse of discretion.

AFFIRMED

PUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

AMERICAN CHIROPRACTIC ASSOCIATION, ET AL.,

Plaintiffs,

v.

TRIGON HEALTHCARE, INC., ET AL.,

Defendants.

Case No. 1:00CV00113

OPINION

By: James P. Jones
United States District Judge

[ENTERED: APRIL 25, 2003]

George P. McAndrews, McAndrews, Held & Malloy, Ltd., Chicago, Illinois, for Plaintiffs; Howard Feller, McGuireWoods LLP, Richmond, Virginia, for Defendants.

American Chiropractic Association, Inc., Virginia Chiropractic Association, Inc., and certain individual doctors and patients of chiropractic medicine filed this action against health insurer Trigon Healthcare, Inc., and affiliated companies ("Trigon") claiming anticompetitive activities harmful to chiropractic medicine. Following discovery, Trigon has moved for summary judgment. For the reasons set forth in this opinion, I find that there are no genuine issues of material fact remaining for trial and that Trigon is entitled to judgment in its favor.

I

Chiropractic is a recognized branch of the healing arts, and chiropractic treatment is widely utilized by consumers of medical services, mainly for neuromusculoskeletal disorders such as back pain, neck pain, and headaches. Such disorders affect a large proportion of the American adult population.[1] Trigon is a health care insurer that does business as Trigon Blue Cross Blue Shield and was formerly known as Blue Cross and Blue Shield of Virginia.[2] Until 1991 Trigon was a not-for-profit entity, but thereafter became a for-profit, publically owned corporation, in the business of offering individual and group healthcare plans to its subscribers. It is currently "the largest managed healthcare company in Virginia."[3]

The core claim made in this case is that Trigon has intentionally prevented or discouraged its subscribers from utilizing chiropractic at the behest of physicians. In the plaintiffs' words, the purpose of this conspiracy was "to

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[1] *See* U.S. Dep't of Health & Human Servs., Office of Inspector Gen., *Chiropractic Care: Controls Used By Medicare, Medicaid, and Other Payors* 1 (1998), Pls.' Ex. 6. Most chiropractic treatment consists of manual adjustments of the spine in order to correct abnormalities known as subluxations. *See* Third Am. Comp. ¶ 39-41.

[2] Trigon is an independent licensee of Blue Cross and Blue Shield Association ("BCBSA"). BCBSA was initially named as a party to this action but was voluntarily dismissed as a defendant by the plaintiffs. Trigon was recently acquired by a larger healthcare company, Anthem, Inc., based in Indiana. *See* Bob Rayner, *Trigon, Anthem Deal Gets OK*, Richmond Times-Dispatch, July 24, 2002, at C1.

[3] *See* Third Am. Comp. ¶ 67; Answer to Third Am. Comp. ¶ 67.

prevent the transfer of insurance dollars from medical doctors to chiropractors."[4] More specifically, the plaintiffs contend that Trigon's anticompetitive conduct included the issuance of a clinical practice guideline on the treatment of low back pain; the continuation of a $500 reimbursement cap on spinal manipulations; the reduction in the payment rate for services other than spinal manipulations; the "leveling" of payments for manipulations of multiple regions of the spine; suggesting to competing providers—osteopaths and physical therapists—ways to avoid payment limitations; and negotiation with medical doctors rather than chiropractors over reimbursement terms. The legal foundations for the plaintiffs' claims are the anticonspiracy provisions of the Sherman Act, 15 U.S.C.A. § 1 (West 1997) (Count I), the Virginia Civil Conspiracy Act, Va. Code Ann. §§ 18.2-499, -500 (Michie 1996) (Count V), and the common law (Count VII); the antimonopolization provision of the Sherman Act, 15 U.S.C.A. § 2 (West 1997) (Count II); tortious interference with business expectancies (Count IV); and breach of contract (Count VI).[5] The court has jurisdiction pursuant to 28 U.S.C.A. §§ 1331, 1337(a), and 1367(a) (West 1993 & Supp. 2002).

Following extensive discovery, Trigon has moved for summary judgment. The issues have been briefed and argued and the motion is ripe for decision.

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[4] Pls.' Opp'n 14.

[5] Counts III (RICO) and VIII (state insurance equality laws) were earlier dismissed on motion of the defendants. *See Am. Chiropractic Ass'n. v. Trigon Healthcare, Inc.*, 151 F. Supp. 2d 723, 732-35 (W.D. Va. 2001).

II

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327.

It is equally well established that summary judgment is appropriate in cases alleging an antitrust conspiracy and indeed is required when the plaintiff fails to offer "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "'[T]he very nature of antitrust litigation encourages summary disposition of such cases when permissible." *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 708 (4th Cir. 1991) (quoting *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988)).

After careful review of the summary judgment record, I find that the intracorporate immunity doctrine bars the majority of the plaintiffs' conspiracy allegations in this case because Trigon, as a matter of law, cannot conspire

with its employees and agents. For the remainder of the plaintiffs' allegations, Trigon's sworn denials of conspiracy, the affidavits, and the deposition testimony establish that Trigon acted unilaterally and that there is no basis for any inference of a conspiracy. Accordingly, summary judgment is warranted on the antitrust conspiracy claims.

A

Section 1 of the Sherman Act prohibits unreasonable restraints of trade effected by "contract, combination . . . or conspiracy." 15 U.S.C.A. § 1. "It is incontestable that 'concerted action' in restraint of trade lies at the heart of a Sherman Act section 1 violation." *Va. Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 280 (4th Cir. 2002). "The Sherman Act distinguishes between concerted and independent action." *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139,145 (4th Cir. 1990). Thus, unless the plaintiffs can prove that Trigon conspired with one or more other persons, Trigon's policies and practices regarding chiropractors cannot be a violation of section 1 of the Sherman Act.

"The doctrine of intracorporate immunity holds that because at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself. " *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 151 F. Supp. 2d at 731. A corporation cannot conspire with its employees or agents because "[t]he officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

There is a limited exception to the general rule that a corporation cannot conspire with its employees or agents when these individuals have "an independent personal stake in achieving the corporation's illegal objective." *Oksanen*, 945 F.2d at 705.

The plaintiffs have identified the primary coconspirators with Trigon as the medical doctors who served on Trigon's Managed Care Advisory Panel, the medical associations with which they were affiliated, the Medical Society of Virginia, and osteopaths and physical therapists.[6] In one of their principal arguments, the plaintiffs claim that the doctors on the Managed Care Advisory Panel helped establish a clinical practice guideline on the treatment of low back pain that de-emphasized the importance of spinal manipulation.

Despite these allegations, the summary judgment record shows that the independent personal stake exception is inapplicable and that intracorporate immunity bars the bulk of the conspiracy claims. In the first place, the Trigon employees who are alleged to be conspirators were full-time officers and employees of Trigon, did not engage in the

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[6] In their Complaint, the plaintiffs contended that the coconspirators were medical doctors serving on Trigon's Provider Policy Committee and BCBSA. *See* Third Am. Comp. ¶¶ 126, 127, 133. The Provider Policy Committee (formerly named the Provider Relations Committee) was an ad hoc committee of Trigon's board of directors, while the Managed Care Advisory Panel contained other membership. Trigon objects to any consideration of allegations concerning conspirators not expressly identified in the Complaint, but the federal rules provide that the pleadings may be deemed amended to conform to the evidence. *See* Fed. R. Civ. P. 15(b). The defendants have been made aware of the actual contention of the plaintiffs through the extensive discovery in this case. Accordingly, there is no prejudice to any party in considering these additional allegations.

private practice of medicine, always acted in Trigon's best interest, and did not obtain any personal benefit from Trigon's decisions regarding chiropractors.

Second, the plaintiffs have not presented any evidence to show that any of the Trigon panel members competed with them for the treatment of neuromusculoskeletal disorders. At most, the plaintiffs showed that some of the doctor members were designated by their professional organizations.[7] The plaintiffs' contention that other members of these entitles may compete with doctors of chiropractic is unavailing absent evidence that Trigon's agents—the members of the Managed Care Advisory Panel—derived some direct economic benefit from the alleged illegal conduct. *See Oksanen*, 945 F.2d at 705.

Finally, it is established in the record that the Managed Care Advisory Panel had no decision making authority, but acted in an advisory capacity to Trigon. As such, its members could not control Trigon's decisions. *See id.* ("'To give advice when asked by the decisionmaker is not equivalent to being the decisionmaker itself.'") (quoting

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[7] While Trigon formally appointed the members of the Managed Care Advisory Panel, there is evidence that in practice members were chosen by the Virginia chapters of the American Academy of Pediatrics, the American Academy of Family Physicians, the American College of Physicians, and the American College of Surgeons, along with the Virginia Society of Internal Medicine, the Virginia Obstetrical and Gynecological Society, the Medical Society of Virginia, the University of Virginia Medical School, Eastern Virginia Medical School, and the Medical College of Virginia. *See* Letter from J. Lawrence Colley to Craig N. Bush of 5/2/97, Pls.' Ex. 27. As its name implies, the purpose of the Managed Care Advisory Panel was to advise Trigon on clinical issues related to managed care plans. *See* Norwood Dep. ¶ 6, Defs.' Ex. 7.

Penn. Dental Ass'n v. Medical Serv. Ass'n, 745 F.2d 248, 259 (3d Cir. 1984)).

B

The plaintiffs' remaining allegations are that Trigon conspired with the BCBSA and the professional organizations that had representatives on the Managed Care Advisory Panel to restrict access to chiropractors. However, the record demonstrates that no conspiracy existed.

The Supreme Court has declared that to establish the existence of concerted action, a plaintiff must prove that two or more persons possessed "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). "[T]here must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

Where, as here, the allegations of an antitrust conspiracy are based on circumstantial evidence,[8] the Supreme Court has set forth the standard for what

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[8] In spite of the plaintiffs' argument to the contrary, there is no direct evidence in the record of a conspiracy. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) (holding that direct evidence must be "explicit and requires no inferences to establish the proposition or conclusion being asserted."). "Only rarely will there be direct evidence of an express agreement" in conspiracy cases. *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 720 (1965) (Goldberg, J., dissenting). All of the alleged conspirators in this case expressly deny any plans or discussions concerning the object of the alleged conspiracy.

constitutes sufficient evidence of a conspiracy and has limited the range of permissible inferences that can be drawn from circumstantial evidence. "The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [defendants]." *Monsanto*, 465 U.S. at 768. "To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co.*, 475 U.S. at 588.

At bottom, the plaintiffs' conspiracy argument makes no economic sense. Trigon, as a profit-seeking corporation, had no economic motive to prevent referrals to chiropractors. In fact, the uncontradicted evidence in the record is that from 1996 to 2001 the number of chiropractors in Trigon's Participating Provider ("PAR") and Preferred Provider Organization ("PPO") networks nearly doubled (from 1095 to 1934),[9] the number of Trigon insureds receiving chiropractic manipulations nearly trebled (from 26,275 to 74,477),[10] and chiropractors' share of Trigon's total payments to professional providers increased by fourteen percent.[11] Trigon's profit-maximizing interest was to allow its members to obtain needed medical care while paying medical providers the lowest possible cost. If, as the plaintiffs' believe, chiropractic treatments are cheaper and more effective than certain competing medical remedies (such as drug therapies), it was clearly economically advantageous to Trigon to encourage, rather than

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[9] *See* Bradley Aff., Defs.' Ex. 39. The number of licensed chiropractors in Virginia increased by only eighteen percent in that period. *See* Third Am. Comp. ¶ 47.

[10] *See* Zeh Aff., Defs.' Ex. 1.

[11] *See* Bean Aff., Defs.' Ex. 2.

discourage, the utilization of chiropractic. Moreover, to the extent potential subscribers desired chiropractic care, it was in Trigon's competitive interest to provide access to that treatment. The fact that Trigon did not increase the use of chiropractic treatment as much as the plaintiffs desire is not evidence of conspiracy.[12]

In addition, the specific alleged anticompetitive conduct complained of by the plaintiffs does not support the existence of an unlawful conspiracy.

For example, the plaintiffs rely heavily on Trigon's adoption of a clinical practice guideline in 1996 as proof of a conspiracy. This guideline, entitled "Managing Low Back Problems in Adults," was drafted by Trigon employees and considered (but not revised) by the Managed Care Advisory Panel. Trigon contends that its guideline, which was distributed to all of its providers including chiropractors, was merely a simplified version of a clinical guideline published by a federal agency in 1994.[13] The plaintiffs point to the opinion of their expert, Scott Haldeman, that the

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[12] The plaintiffs argue that Trigon's statistics also show that the number of visits per patient and payments per patient decreased over time. *See* Pls.' Opp'n 46-49. However, as the defendants point out, that may be more a function of patients' decisions following initial referrals.

[13] *See* U.S. Dep't of Health & Human Servs., Public Health Serv., Agency for Health Care Policy & Research, *Clinical Practice Guideline No. 14, Acute Low Back Problems in Adults* (1994), Pls.' Ex. 22. In addition, there is a companion "Quick Reference Guide for Clinicians" that contains the highlights of the guideline, including algorithms (step-by-step procedures) for evaluating low back pain. *See* Pls.' Ex. 23. Trigon's algorithms contained in its guideline closely follow the federal algorithms. *See* Side-by-Side Comparison of AHCPR Guidelines & Trigon Guidelines, Defs.' Ex. 51.

Trigon guideline is "inconsistent" and "in conflict" with the federal guideline, mainly because while the Trigon guideline recommends "manipulation" as a treatment option, it omits the federal definition of manipulation. The expert believes that the federal definition favors the type of manipulation given by chiropractors over other providers.[14] Even assuming that this opinion is credible—and I find it very thin—it is insufficient circumstantial proof of a conspiracy. It is clear that Trigon's guideline follows the federal guideline in a highly abbreviated form. The uncontested evidence is that since Trigon's guideline was issued in 1996, no chiropractor provider ever complained to Trigon about the omission of the definition of manipulation or anything else about it. Moreover, since it was issued, use of chiropractic treatment by Trigon subscribers has substantially increased.

The plaintiffs also complain that the continuation by Trigon in its health care plans of a maximum annual payment allowance of $500 for "spinal manipulations and other manual medical interventions"[15] is evidence of a conspiracy with medical doctors and their organizations. Again, however, this fact supports the proposition that Trigon acted in its own self interest to limit its costs. The evidence shows that Trigon's payment and coverage policies were based on its understandable goal of obtaining

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[14] *See* Haldeman Decl. ¶¶ 4, 5, Pls.' Ex. 24. In the federal guideline manipulation is defined as "manual therapy in which loads are applied to the spine using short or long lever methods." U.S. Dep't of Health & Human Servs., *supra* note 12, at 34. Both the Trigon and the federal guidelines recommend manipulation as a treatment option for nonspecific low back symptoms, but the Trigon guideline does not define manipulation.

[15] Third Am. Comp. ¶ 119.

professional services at the lowest possible cost the market would bear.

Trigon was not alone in its utilization of mechanisms for limiting the expense of chiropractic services. The summary judgment record shows that caps on chiropractic payments were used by ninety-four percent of selected large national private insurers,[16] and that other healthcare insurers in Virginia have practices comparable to Trigon's.[17] There is no question but that the intent of these methods was to limit the quantity of chiropractic care. But that is not proof that Trigon (or other insurers) conspired with the medical profession to this end.[18]

The plaintiffs submitted evidence that Trigon "suggested" to osteopaths and physical therapists ways to "get around" the limitations on manipulation reimbursement and that since those professions are "closely associated with" medical doctors, these efforts show evidence of the charged conspiracy.[19] Trigon denies any such suggestions; in any event, the record is clear that Trigon never changed its procedures to benefit osteopaths or physical therapists. I do not find these allegations

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[16] *See* U.S. Dep't of Health & Human Servs., *supra* note 1, at 6. Other methods used to control chiropractic costs are requiring physician referrals; co-payments, coinsurance, and deductibles; and prepayment reviews. *See id.* at ii.

[17] *See* Bowles Aff., Defs.' Ex. 31.

[18] For the same reasons, Trigon's 1996 reduction of the reimbursement rate for nonmanipulative procedures by chiropractors and its 1997 "leveling" of payments to chiropractors for manipulations of various regions of the spine, are not proof of a conspiracy.

[19] Pls.' Opp'n 38, 41.

sufficient to produce a triable issue of fact as to the existence of an anticompetitive conspiracy.

Finally, the plaintiffs contend that there is evidence that Trigon negotiated with the Medical Society of Virginia, representing medical doctors, over reimbursement terms, but did not similarly negotiate with chiropractors. However, I agree with the defendants that the evidence shows only that Trigon was willing to listen to suggestions by this physician group. Of course, there is no evidence in the record that Trigon ever discussed with the Medical Society of Virginia, or any other professional association, any policies harmful to chiropractic providers.

C

The plaintiffs allege in Count II that Trigon has attempted to monopolize the market for the treatment of neuromusculoskeletal disorders in violation of section 2 of the Sherman Act. They also allege that Trigon has conspired with BCBSA and medical doctors to monopolize this market. The plaintiffs' conspiracy to monopolize claim under section 2 of the Sherman Act fails for the same reason that the plaintiffs' section 1 claim fails—there is no evidence of a conspiracy between Trigon and any other persons.

The attempt to monopolize claim also is defective. This claim has four essential elements: (1) a specific intent to monopolize; (2) a relevant market; (3) predatory or anticompetitive acts; and (4) a dangerous probability of success in achieving monopolization. *See Advanced Health-Care Servs., Inc.*, 910 F.2d at 147. The short answer to this claim is that Trigon and chiropractors do not compete in the same market. *See White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104 (4th Cir. 1987) ("One who does not compete in a product market or conspire with a competitor cannot be held liable as a monopolist in that market.").

D

The plaintiffs' state law conspiracy claims (Count V and Count VII) fail for the same reasons as the antitrust claims. Virginia has adopted the intracorporate immunity doctrine. *See Selman v. Am. Sports Underwriters, Inc.*, 697 F. Supp. 225, 238 (W.D. Va. 1988). For those alleged conspirators not subject to the doctrine of intracorporate immunity, the facts as recited in connection with the federal antitrust laws equally show that no violation of the Virginia conspiracy laws has occurred.

III

The plaintiffs also raise other state law claims, of which the court has supplemental jurisdiction. While I might dismiss these pendant claims, considerations of economy and fairness indicate that I should adjudicate them, since they have been fully developed and presented in this case. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988).

The chiropractor plaintiffs claim that Trigon interfered by improper means with their business expectancies to treat patients covered by Trigon. The requisite elements for proof of a tortious interference are: (1) the existence of a valid business expectancy; (2) knowledge of the expectancy on the part of the interferor; (3) an intentional interference by improper methods; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *See Duggin v. Adams*, 360 S.E.2d 832, 835-36 (Va. 1987). I find that there is insufficient evidence that any such valid expectancy existed or, if it did, that any improper means of interference was used by Trigon. As explained above, Trigon's efforts to limit its costs were not illegal and do not support the state law tort claim.

Similarly, there is no evidence that Trigon breached any contract with the plaintiffs. The evidence does not support any claim that Trigon's reimbursement payments were unconscionable. *See Reibold v. Simon Aerials, Inc.*, 859 F. Supp. 193, 198 (E.D. Va. 1994) ("Courts will rarely find unconscionable contracts arising in a commercial context."). As noted earlier, Trigon's limitations on treatment by chiropractors are not unusual in the healthcare field. *See Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991) (holding that where disputed provision of commercial contract was common to industry, a finding of unconscionability cannot be based on disparate size of parties). Moreover, there is no evidence that the chiropractors were under legal duress when they accepted the terms of their provider agreements. *See Blevins v. New Holland N. Am., Inc.*, 97 F. Supp. 2d 747, 751 (W.D. Va. 2000) (holding that lack of opportunity to negotiate a provision of a commercial contract is not sufficient evidence of unconscionability).

For these reasons, the plaintiffs are unable to prove that the provider agreements with chiropractors breached any duty to avoid unconscionable terms. [20]

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[20] In view of my finding that there is inadequate evidence on the merits as to the state law claims, it is not necessary that I resolve the defenses that these claims are barred by the applicable statutes of limitations or preempted by ERISA.

IV

For the foregoing reasons, I will grant the defendants' Motion for Summary Judgment and enter final judgment on their behalf. A separate judgment consistent with this opinion is being entered herewith.

DATED: April 25, 2003

/s/ James P. Jones
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

AMERICAN CHIROPRACTIC ASSOCIATION, ET AL.,

Plaintiffs,

v.

TRIGON HEALTHCARE, INC., ET AL.,

Defendants.

Case No. 1:00CV00113

JUDGMENT

[ENTERED: APRIL 25, 2003]

By: James P. Jones
United States District Judge

For the reasons stated in the opinion accompanying this final judgment, it is **ADJUDGED AND ORDERED** that the Motion for Summary Judgment by the defendants [Doc. No. 103] is granted and final judgment on the merits is entered in favor of the defendants.

The clerk is directed to close the case.

ENTER: April 25, 2003

/s/ James P. Jones
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED JUNE 2, 2004

[ENTERED: JUNE 2, 2004]

No. 03-1675
CA-00-113-1

AMERICAN CHIROPRACTIC ASSOCIATION, INCORPORATED, a non-profit corporation; VIRGINIA CHIROPRACTIC ASSOCIATION, INCORPORATED; GEORGE W. CHIRIKINIAN, D.C.; DOUGLAS M. COX, D.C.; WILLIAM R. THEISIER, D.C.; JOHN C. WILLIS, D.C.; JERRY R. WILLIS, D.C.; SARAH ELIZABETH ALLEN; LANA KAY BALL; MARGARET BYRNE; ROGER DALTON; MARY SUE DEAN; HARVIE LEE FRENCH, JR.; PATRICIA HERMAN; CINDY LINKENHOKER; SANDRA PHILLIPPI; DARLENE REQUIZO; DAVID RUSOTTO; GLORIA JEAN SMITH; LYNN D. WAGNER; ANDREA WALLACE; PATRICIA WHITTINGTON; BENIS D. WOOD; RICHARD D. WORLEY; DALE DUKE YONTZ; DOUGLAS STINE; WENDY HOLDEN WILLIS; STEVEN W. YATES; KEVIN J. WESTBY; GREGORY WALTER; JEFFERSON K. TEASS

Plaintiffs – Appellants

v.

TRIGON HEALTHCARE, INCORPORATED; TRIGON INSURANCE COMPANY; TRIGON ADMINISTRATORS; MID-SOUTH INSURANCE COMPANY; TRIGON HEALTH AND LIFE INSURANCE COMPANY

Defendants – Appellees

And

BLUE CROSS AND BLUE SHIELD ASSOCIATION

Defendant

On petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Williams, Judge Michael, and Judge Quarles.

For the Court,

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

American Chiropractic Association, Inc. a non-profit corporation, Virginia Chiropractic Association, Inc., Douglas F. Ambrose D.C., George W. Chirkinian D.C., Douglas M. Cox D.C., George B. McClelland D.C., James M. Porter D.C., Larry L. Stine D.C., William R. Thesier D.C., Kevin J. Westby D.C., John C. Willis D.C., Jerry R. Willis D.C., Wendy Holden Willis D.C., Steven W. Yates D.C., Sarah Elizabeth Allen, Lana Kay Ball, Margaret Byrne, Roger Dalton, Mary Sue Dean, Harvie Lee French, Jr., Patricia Herman, Cindy Linkenhoker, Sandra Phillippi, Darlene Requizo, David Russotto, Gloria Jean Smith, Lynn D. Wagner, Andrea Wallace, Patricia Whittington, Richard D. Worley, and Dale Duke Yontz,	)	CASE NO. 1:00 CV 00113
Plaintiffs,	)	Judge James P. Jones
v.	)	Trial by Jury Demanded
Trigon Healthcare, Inc., Trigon Insurance Co., Trigon Administrators, Inc., Mid-South Insurance Company, and Trigon Health and Life Insurance Company,	)	
Defendants.	)	

THIRD AMENDED COMPLAINT

Preamble

1. This Complaint alleges that the defendants have, individually and acting in concert, wrongfully harmed the plaintiffs by: an unlawful anticompetitive combination and conspiracy among Trigon companies, medical doctors, and Blue Cross and Blue Shield Association that violates the antitrust laws of the United States; by a pattern of racketeering activity by Trigon companies that includes extortion, mail fraud, wire fraud, and securities fraud and that violates the Racketeer Influenced and Corrupt Organizations Act ("RICO"); by unlawfully discriminating against chiropractic including increasing the cost to persons covered by Trigon healthcare plans of chiropractic care as compared to care by a medical doctor and paying discriminatory and inadequate compensation to doctors of chiropractic for chiropractic treatment; by conspiring to injure the practices of doctors of chiropractic by a common law conspiracy and in violation of Virginia law, Va. Ann. Code §§182-499 and 500; and by breaching obligations implied in the law of Virginia to reasonably compensate doctors of chiropractic for treatment of persons covered by Trigon healthcare plans. Plaintiffs allege upon knowledge as to themselves and their own acts and upon information and belief as to other matters based on, observations, experience, and investigation by themselves, their agents, and attorneys.

Introduction

2. The plaintiffs, the American Chiropractic Association, Inc. ("ACA") and Virginia Chiropractic Association ("VCA") bring this action on behalf of their members, doctors of chiropractic, and their patients. The plaintiff individual doctors of chiropractic bring this action on behalf of themselves and their patients. Plaintiffs ACA, VCA, and doctors of chiropractic seek to recover damages, enhanced damages, punitive damages, costs including

attorneys' fees, and equitable relief precluding defendants from engaging in wrongful acts that deny access to treatment by a licensed doctor of chiropractic to persons covered by healthcare plans sold and/or administered by Trigon Healthcare, Inc. and its subsidiaries (collectively "Trigon") and/or impede and discourage those persons from seeking treatment by doctors of chiropractic. Plaintiffs ACA, VCA, and the individual doctors of chiropractic seek reasonable compensation for services rendered by doctors of chiropractic to persons covered by healthcare plans sold and/or administered by Trigon ("Trigon healthcare plans") and for which doctors of chiropractic have received no compensation or otherwise unconscionably inadequate compensation. Plaintiff individuals who are patients of doctors of chiropractic and who are or have been covered by Trigon healthcare plans seek compensation for costs of care by a doctor of chiropractic that have not been covered by healthcare plans administered by Trigon and damages and enhanced damages for being denied care by a doctor of chiropractic by Trigon's anti-chiropractic policies and practices.

3. Over the years anti-chiropractic bias has existed in insurance companies and other organizations providing prepaid healthcare in spite of the recognition and licensing of chiropractic in all fifty states, in spite of laws passed by States prohibiting discrimination against doctors of chiropractic, and in spite of laws passed by Congress to insure access to chiropractic care by patients enrolled in government sponsored, managed healthcare programs. Certain Blue Shield healthcare plans have, in the past, been shown to exclude coverage of chiropractic services even when state law required coverage of chiropractic treatment.

4. The actions of defendants complained of here, and the bias demonstrated by defendants, is, on information and belief and historical fact, a result of medical doctors' strong

influence on and dominating presence within Trigon and a result of defendants' desire to control and reduce access to chiropractic healthcare by persons covered by Trigon healthcare plans. Upon information and belief, defendants, acting individually and in concert, have entered into a scheme to render chiropractic a secondary and marginal treatment to which access by persons covered by Trigon healthcare plans is severely restricted or eliminated altogether.

Parties

5. Plaintiff, ACA is a non-profit corporation organized under the laws of the State of Delaware. ACA's membership includes doctors of chiropractic who provide chiropractic treatment to patients throughout the Commonwealth of Virginia. ACA's address is 1701 Clarendon Blvd., Arlington, Virginia 22209.

6. Plaintiff, VCA is a non-profit professional association organized under the laws of the Commonwealth of Virginia. VCA's membership includes doctors of chiropractic who provide chiropractic treatment to patients throughout the Commonwealth of Virginia. VCA's address is 1909 Huguenot Rd., Suite 103, Richmond, Virginia 23235 (mailing address: PO Box 35231, Richmond, Virginia 23235).

7. Plaintiff George W. Chirkinian D.C. is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Chirkinian's office is in Richmond, Virginia.

8. Plaintiff Douglas M. Cox D.C. is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Cox's office is in Charlottesville, Virginia.

9. Plaintiff William R. Thesier D.C. is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Thesier's office is in Virginia Beach, Virginia.

10. Plaintiff John C. Willis D.C. is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Willis' office is in Richlands, Virginia.

11. Plaintiff Jerry R. Willis D.C. is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Willis' office is in Wytheville, Virginia.

11.1 Plaintiff Douglas F. Ambrose is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Ambrose has provided chiropractic treatment to patients who are insured by Trigon pursuant to an agreement with Trigon since 1998. Dr. Ambrose's office is in Richmond, Virginia.

11.2 Plaintiff George B. McClelland is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. McClelland has provided chiropractic treatment to patients who are insured by Trigon pursuant to an agreement with Trigon since prior to 1996. Dr. McClelland's office is in Christiansburg, Virginia.

11.3 Plaintiff James M. Porter is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Porter has provided chiropractic treatment to patients who are insured by Trigon pursuant to an agreement with Trigon since 2000. Dr. Porter's office is in Wytheville, Virginia.

11.4 Plaintiff Larry L. Stine is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Stine has provided chiropractic treatment to patients who are insured by Trigon pursuant to an agreement with Trigon

since prior to 1996. Dr. Stine's office is in Fredericksburg, Virginia.

11.5 Plaintiff Wendy Holden Willis is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Willis has provided chiropractic treatment to patients who are insured by Trigon pursuant to an agreement with Trigon since prior to 1996. Dr. Willis' office is in Wytheville, Virginia.

11.6 Plaintiff Steven W. Yates is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Yates has provided chiropractic treatment to patients who are insured by Trigon pursuant to an agreement with Trigon during the relevant period for this lawsuit. Dr. Yates's office is in Gloucester Point, Virginia.

11.7 Plaintiff Kevin J. Westby is a chiropractor who is licensed to practice in the Commonwealth of Virginia. Dr. Westby has provided chiropractic treatment to patients who are insured by Trigon pursuant to an agreement with Trigon since prior to 1996. Dr. Westby's office is in Hampton, Virginia.

12. Sarah Elizabeth Allen is a resident of Richmond, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

13. Lana Kay Ball is a resident of Cedar Bluff, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

14. Margaret Byrne is a resident of Palmyra, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

15. Roger Dalton is a resident of Rural Retreat, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

16. Mary Sue Dean is a resident of Cedar Bluff, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

17. Harvie Lee French, Jr. is a resident of Bland, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

18. Patricia Herman is a resident of Midlothian, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

19. Cindy Linkenhoker is a resident of Suffolk, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

20. Sandra Phillippi is a resident of Wytheville, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

21. Darlene Requizo is a resident of Chesapeake, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

22. David Russotto is a resident of Virginia Beach, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

23. Gloria Jean Smith is a resident of Cedar Bluff, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

24. Lynn D. Wagner is a resident of Midlothian, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

25. Andrea Wallace is a resident of Richlands, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

26. Patricia Whittington is a resident of Richlands, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

27. No averments.

28. Richard D. Worley is a resident of Bluefield, West Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

29. Dale Duke Yontz is a resident of Wytheville, Virginia who is a patient of a doctor of chiropractic and who is covered by a healthcare plan that is administered by Trigon.

30. Defendant Trigon Healthcare, Inc. is a corporation of the Commonwealth of Virginia. Trigon Healthcare, Inc.'s principal place of business is in Richmond, Virginia.

31. Defendant Trigon Insurance Company is a corporation of the Commonwealth of Virginia. Defendant Trigon Insurance Company does business as "Trigon Blue Cross Blue Shield." Defendant Trigon Insurance Company was formerly known as "Blue Cross and Blue Shield of Virginia." Defendant Trigon Insurance Company is wholly owned by Trigon Healthcare, Inc.

32. Defendant Trigon Administrators, Inc. is a corporation of the Commonwealth of Virginia. Defendant Trigon Administrators, Inc. is wholly owned by Trigon Healthcare, Inc.

33. Defendant Mid-South Insurance Company is a corporation of the State of North Carolina. Defendant Mid-South Insurance Company has its principal place of business in Richmond, Virginia. Defendant Mid-South Insurance Company is wholly owned by Trigon Healthcare, Inc.

34. Defendant Health and Life Insurance Company is a corporation of the Commonwealth of Virginia. Defendant Health and Life Insurance Company is wholly owned by Trigon Healthcare, Inc.

Jurisdiction and Venue

35. This Court has jurisdiction over this action pursuant to 15 U.S.C. §§ 15 and 26, 18 U.S.C. §1964, and 28 U.S.C. §§ 1331, 1337, and 1367.

36. Venue is proper in this judicial district pursuant to 15 U.S.C. § 22, 18 U.S.C. §1965, 28 U.S.C. § 1391(b).

Backgound

37. Blue Cross and Blue Shield Association is a corporation of the State of Illinois. Blue Cross and Blue Shield Association's principal place of business is in Chicago, Illinois.

Chiropractic Healthcare

38. Chiropractic is a licensed healthcare profession in all fifty states and the District of Columbia. Chiropractic healthcare treatment is being sought by more and more people. It has been estimated that some 25 million patients will seek treatment from a doctor of chiropractic this year.

39. Chiropractic is concerned largely with the nerves, muscles, and skeleton, the neuromusculoskeletal system. Chiropractic seeks to reduce or eliminate pain and other symptoms by manual positioning of bones to correct abnormalities. The large majority of the practice of chiropractic is adjustment of the spine to treat abnormalities in the position of the spine, referred to as subluxations, which cause pain and other symptoms.

40. The chiropractic term "subluxation" denotes both a science and a philosophy of diagnosis and treatment:

> A spinal subluxation may be defined as an alteration of the normal statics and dynamics of the anatomical or physiological relationships of the spinal vertebrae and its resulting biomechanical and/or neurophysiological effects. These effects may be local, that is at the site of the subluxation and/or distal to the subluxation causing dysfunction to other tissues, organs and

systems, directly or indirectly affected by the subluxation. N.B. See subluxation p. 275.

Chiropractor's Manual, Laurent Boisvert, 1993, p. 91.

41. Medical physicians, osteopathic physicians and physical therapists are not qualified by education and training to diagnose spinal subluxations or to perform manual manipulation of the spine to correct a subluxation. To a medical doctor, a spinal "subluxation" connotes a complete dislocation of the spine that is untreatable by manual manipulation.

42. Chiropractic has been regulated by the Commonwealth of Virginia since 1920. Licensure of chiropractic is provided for by title 54.1 of the Code of Virginia, chapter 29, article 3.

43. Chiropractic, as defined by Title 54.1 of the Code of Virginia, "means the adjustment of the twenty-four moveable vertebrae of the spinal column, and assisting nature for the purpose of normalizing the transmission of nerve energy, but does not include the use of surgery, obstetrics, osteopathy or the administration or prescribing of any drugs or medicines." Va. Ann. Code §54.1-2900.

44. The Commonwealth of Virginia requires that health insurance coverage be provided to state employees and retired state employees that includes coverage of chiropractic treatment. Va. Ann. Code §2.1-20.1 .A.1.

45. The Commonwealth of Virginia requires that insurance policies covering liability arising from operation of an automobile cover chiropractic treatment. Va. Ann. Code §38.2-2201.1.

46. The Commonwealth of Virginia prohibits insurers from refusing reimbursement for a covered service because the service was provided by a licensed chiropractor. Va. Ann. Code §§38.2-2203, 38.2-3408, 38.2-4221, and 38.2-4312(E).

47. The number of doctors of chiropractic licensed by the Commonwealth of Virginia has grown from 493 in 1987 to 1,268 in 1996. There are now more than 1500 doctors of chiropractic licensed by the Commonwealth of Virginia.

Unlawful Discrimination Against Chiropractic by Medical Doctors

48. Chiropractors have long suffered from illegal, anti-competitive prejudice at the hands of the medical community. In 1963, the American Medical Association ("AMA") established a "Committee on Quackery" which considered "its prime mission to be, first, the containment of chiropractic and ultimately, the elimination of chiropractic."

49. The United States District Court for the Northern District of Illinois found that the AMA instituted an unlawful boycott of chiropractic intending to prevent all medical physicians in the United States from referring patients to chiropractors and from accepting referrals of patients from chiropractors, to prevent chiropractors from obtaining access to hospital diagnostic services and membership on hospital medical staffs, to prevent medical physicians from teaching at chiropractic colleges or engaging in any joint research, and to prevent any cooperation whatsoever between the two professional groups in the delivery of healthcare services.

50. In 1988, a United States District Court, in an antitrust action brought by a group of chiropractors, found that the AMA, by far the largest and most powerful

association of medical doctors, organized and led a nationwide, illegal conspiracy to "contain and eliminate" the profession of chiropractic in the United States. Wilk v. American Medical Ass'n., 671 F.Supp. 1465, 1471 (N.D. Ill. 1987). The conspiracy included, *inter alia,* an effort to ban all voluntary professional association between medical doctors, medical institutions, insurance programs, etc., and doctors of chiropractic. Affirming that decision, the United States Court of Appeals for the Seventh Circuit noted: "Indeed, the [district] court found that the AMA intended to 'destroy a competitor,' namely chiropractors." Wilk v. AMA, 895 F.2d 352, 361 (7th Cir. 1990), *cert. den.* The Seventh Circuit approved the equitable relief granted by the district court: "The district court's form of injunction and method of ensuring its publication (and thus its efficacy) was a reasonable attempt at eliminating the consequences of the AMA's lengthy, systematic, successful, and unlawful boycott." Id. at 371.

51. Anti-chiropractic bias in the world of health care, such as that which was proven to have been embraced by the AMA, its members, and its related medical doctor and health care organizations, has existed throughout the second half of the twentieth century. That bias survives today in spite of the fact that chiropractic care has been shown to be as effective, or more effective, than "traditional" medicine for certain common painful and debilitating ailments. Chiropractic can now be called a secondary, alternative, or nontraditional treatment based only on suppression of chiropractic and the continuing effects of past open and unlawful attempts of the AMA and others to suppress and destroy chiropractic.

Discrimination Against Chiropractic by Providers of Health Insurance

52. Recognizing that insurance coverage of healthcare expenses is a powerful tool that could direct patients to providers whose services were covered by healthcare insurance, the AMA sought to achieve its goal of containing and eliminating chiropractic by preventing private health insurance from covering treatment by doctors of chiropractic.

53. In 1973 the AMA worked with medical doctor dominated insurance companies to prevent any insurance payments for chiropractic services. For example, AMA staff met with Blue Shield to prevent insurance payments for chiropractic services:

> CHIROPRACTIC COVERAGE UNDER BLUE SHIELD –
>
> > [AMA] Staff will continue to maintain liaison with the National Association of Blue Shield Plans in regard to chiropractic attempts to gain coverage under Blue Shield. (NOTE: A productive meeting was held with representatives of Blue Shield on this point. They are actively considering various methods of excluding doctors of chiropractic from Blue Shield coverage.)

(Exhibit A to the originally-filed complaint at II. d, emphasis added.); and

> > 1. We [Blue Shield] have filed and may use in 5 states an exclusion deleting manipulative services and subluxations for the purpose of removing nerve interference. Basically, the

> exclusion extends to services of a chiropractor by definition.

(Exhibit B to the originally-filed complaint at B.1, emphasis added.); and

> Resistance to chiropractic payment may be indicated by the fact that fewer [Blue Shield]Plans make payment than the laws require.

(Exhibit C to the originally-filed complaint at p. 2).

54. Health insurance plans have continued to discriminate against chiropractic by imposing coverage limits based on treatments provided by chiropractors rather than based on coverage of treatment of a patient's condition, even where such discrimination is specifically illegal. In one case, a maximum annual benefit of $500.00 for "spinal manipulative therapy and any physical therapy type modalities rendered in connection therewith by an osteopathic physician, chiropractor or medical doctor" was held to be void under a state's statute requiring reimbursement for covered services provided by a doctor of chiropractic and voiding any terminology deemed discriminatory against chiropractic. Nosser v. Health Fund Trust Fund Bd., 666 So.2d 1272 (La.Ct. App. 1996). Even though the limitation literally applied to services provided by other licensed providers, the court recognized that in substance and effect, that limitation discriminates against chiropractic. *Id.* at 1276 - 77.

55. Trigon's heritage includes predecessor Blue Shield plans that were controlled by medical doctors and that discriminated against other non-medical doctor healthcare providers, clinical psychologists. *See* Va. Academy of Clinical Psy. v. Blue Shield of Va., 624 F.2d 476, (4th Cir. 1980).

56. Trigon Insurance company's predecessor, Blue Cross and Blue Shield of Virginia, extended coverage of chiropractic to all healthcare plans in 1988 only after the Commonwealth of Virginia adopted insurance equality laws that prohibited refusal to reimburse a licensed chiropractor for providing covered services. Simultaneously with offering that coverage, Blue Cross and Blue Shield of Virginia adopted a $500.00 annual limit on reimbursement for spinal manipulation, even for plans that had previously covered chiropractic treatment without such a limit. Exhibit D to the originally-filed complaint.

Blue Cross and Blue Shield Trademarks and Service Marks Provide Significant Economic Power to Sellers of Healthcare Plans

57. Blue Cross and Blue Shield Association owns trademarks and service marks for healthcare related products and services that incorporate the terms "Blue Cross", "Blue Shield", or both ("Blue Cross/Blue Shield marks").

58. Blue Cross and Blue Shield Association, its predecessors, and licensees of Blue Cross/Blue Shield marks have, for many years, promoted insurance products and services sold under the Blue Cross/Blue Shield marks.

59. Blue Cross/Blue Shield marks are recognized by 99 percent of consumers who associate those marks with "quality, dependability, choice, and nationwide acceptance."

60. The number of people covered by Blue Cross and Blue Shield healthcare plans has increased every year for the last four years.

61. As a consequence of this wide recognition, the exclusive right to sell products and services under the Blue Cross/Blue Shield marks provides a licensee of the marks a significant competitive advantage and significant economic power.

62. Blue Cross and Blue Shield Association licenses Blue Cross/Blue Shield marks to insurance companies for exclusive use in geographic regions of the United States. Within its region of exclusivity, an insurance company that has licensed Blue Cross/Blue Shield marks faces no competition from products or services sold under the Blue Cross/Blue Shield marks.

63. The Blue Cross and Blue Shield system of healthcare plans "is coordinated by the Blue Cross and Blue Shield Association."

64. As a matter of fundamental trademark law of the United States, in coordinating the system of Blue Cross and Blue Shield healthcare plans, Blue Cross and Blue Shield Association must require that products and services offered under the Blue Cross/Blue Shield marks conform to standards that the public has come to expect of products and services sold under those marks. To assure that products and services offered by licensees under the Blue Cross/Blue Shield marks conform to those standards, Blue Cross and Blue Shield Association must act in concert with licensees of the Blue Cross/Blue Shield marks and approve of the products and services with which licensees use Blue Cross/Blue Shield marks.

65. Blue Cross and Blue Shield Association permits the Blue Cross/Blue Shield marks to be used by licensees including Trigon to sell products and services that unfairly discriminate against doctors of chiropractic and their patients. In fact, state chiropractic associations from approximately eighteen (18) different states have recently reported that the Blue Cross and Blue Shield Association licensee in each respective state has instituted some form of anti-chiropractic policy.

Count I - Combination and Conspiracy in Restraint of Interstate Commerce - Trigon Companies, Blue Cross and Blue Shield Association, and Medical Doctors

66. Plaintiffs repeat the allegations of paragraphs 1 - 65.

67. Trigon Healthcare, Inc. "is the largest managed healthcare company in Virginia." Trigon Healthcare Inc. wholly owns Trigon Insurance Co., Trigon Administrators, Inc., Trigon Health and Life Insurance Company and other corporations that sell healthcare insurance and/or administer healthcare plans.

68. Until this year, Trigon Healthcare Inc. wholly owned Mid-South Insurance Company.

69. Trigon Healthcare, Inc. and its subsidiaries paid more than $2.8 billion in 1999 to healthcare providers for medical and other benefit costs of programs that they administered.

70. Trigon Healthcare, Inc. and its subsidiaries administer healthcare plans that cover approximately 32% of the residents of Virginia, which is approximately 43% of those covered by private insurance.

71. The number of persons covered by healthcare plans administered by Trigon is growing. Enrollment in those plans in Virginia increased approximately 8 % from 1998 to 1999.

72. The number of persons covered by healthcare plans sold by Trigon increased by 14.5% from June 30, 1999 to June 30, 2000, and the number' of persons covered by preferred provider organization ("PPO") healthcare plans sold by Trigon increased 36 % from June 30, 1999 to June 30, 2000.

Trigon's Policies Concerning Healthcare Providers. Including Doctors of Chiropractic, are Determined and Administered by Medical Doctors

73. Trigon Healthcare, Inc.'s wholly owned subsidiaries adhere to and enforce policies concerning healthcare providers that are determined by Trigon Healthcare, Inc.

74. The policies of Trigon Healthcare, Inc. that relate to healthcare providers, both institutions and individual healthcare practitioners, must be approved by a committee of the board of directors of Trigon Healthcare, Inc., the Provider Policy Committee.

75. The Provider Policy Committee of the Board of Directors of Trigon Healthcare, Inc. "reviews management proposals and makes recommendations to the Board of Directors of Trigon Healthcare, Inc. with respect to Trigon's policies and procedures that have a substantial impact upon institutional and professional providers of healthcare services."

76. The Provider Policy Committee consists of six members, four of whom, including the committee chairman,

are medical doctors. Though the Provider Policy Committee is a committee of the Board of Directors of Trigon Healthcare, Inc., two of the medical doctor members of that committee are not directors of Trigon Healthcare, Inc. One of those non-director members of the Provider Policy Committee is Lawrence E. Blanchard III M.D., immediate past president of the Medical Society of Virginia.

77. Medical doctors hold other positions within Trigon Healthcare, Inc. and within its wholly owned subsidiaries that are responsible for administering and executing policies concerning healthcare providers including J. Lawrence Colley, M.D., Trigon Insurance Co.'s vice president and medical director.

Medical Doctors Compete With Chiropractors and Have A Competitor's Interest in Trigon's Policies Concerning Healthcare Providers

78. It has long been established that doctors of medicine, doctors of osteopathy, and doctors of chiropractic provide competing services - i.e., patients may substitute one provider for the other based on satisfaction, perceived wellbeing, insurance coverage, etc.

79. Chiropractors and medical doctors compete with each other in the market for healthcare services, and particularly in the submarket for treatment of neuromusculoskeletal conditions of the back.

80. Medical doctors who determine policies of Trigon Healthcare, Inc. and its subsidiaries have an interest in the market for healthcare services that derives from their profession as a medical doctor and that is distinct from and in addition to their interest as a director, officer, agent, and employee of Trigon Healthcare, Inc. and/or its subsidiaries.

Healthcare Plans Sold by Trigon Under the Blue Cross/Blue Shield Marks Conform to the Requirements of the Blue Cross and Blue Shield Association

81. Trigon has licensed from Blue Cross and Blue Shield Association the exclusive right to use the Blue Cross/Blue Shield marks within the Commonwealth of Virginia other than a small portion of the northern Virginia suburbs adjacent to Washington D.C.

82. Trigon sells healthcare plans under the Blue Cross/Blue Shield marks that conform to the requirements imposed by the Blue Cross and Blue Shield Association pursuant to the agreement between Trigon and Blue Cross and Blue Shield Association granting Trigon rights to use the Blue Cross/Blue Shield marks.

83. Blue Cross and Blue Shield Association knowingly permits Trigon Insurance, Inc. to offer healthcare plans and services under the Blue Cross/Blue Shield marks that conform to and are administered in conformance with the polices concerning healthcare providers that are determined by Trigon Healthcare, Inc.

84. Blue Cross and Blue Shield Association knowingly permits Trigon use the Blue Cross/Blue Shield marks to sell healthcare plans and services that wrongfully discriminate against doctors of chiropractic.

Onerous Conditions Required of Healthcare Providers by Trigon

85. Trigon Services, Inc., on behalf of Trigon Healthcare, Inc.'s subsidiaries Trigon Insurance, Inc., Trigon Administrators, Inc., and Trigon Health and Life Insurance Company, and Trigon Healthcare, Inc.'s formerly wholly owned subsidiary Mid-South Insurance Company, entered

into agreements with healthcare providers pursuant to which healthcare providers provide and/or have provided healthcare services to persons covered by healthcare plans sold and/or administered by those subsidiaries.

86. The agreements with Trigon Services, Inc. impose conditions and obligations on healthcare providers that govern and/or govern services provided to persons covered by healthcare plans administered by those subsidiaries and that former subsidiary of Trigon Healthcare, Inc.

87. As a condition for being a provider of healthcare services to persons covered by healthcare plans sold and/or administered by those Trigon subsidiaries, a provider must agree that Trigon will determine the amount that the provider must accept as payment in full for services provided to those persons.

88. Trigon requires doctors of chiropractic to accept an "Ancillary Professional Provider Agreement" as a condition for becoming a "network" or "participating" Trigon provider. The Ancillary Professional Provider Agreement includes the requirement that the doctor of chiropractic accept Trigon's determination of the amount that is full payment for services provided by the doctor of chiropractic to persons covered by Trigon healthcare plans.

89. Nearly 95% of the physicians in the Commonwealth of Virginia have agreed to Trigon's terms for providing healthcare services to persons covered by healthcare plans administered by Trigon.

Trigon's Unreasonable Restraint on Access to Doctors of Chiropractic

90. Trigon can discourage healthcare providers from offering services to persons covered by healthcare plans administered by Trigon by requiring that providers agree to onerous terms as a condition for being a Trigon provider.

91. Trigon can direct persons covered by healthcare plans administered by Trigon away from disfavored healthcare providers and to favored healthcare providers by setting the terms and the extent of coverage of services provided by healthcare providers.

92. Trigon has sought to discourage doctors of chiropractic from offering chiropractic treatment to persons covered by healthcare plans administered by Trigon by imposing conditions for covered chiropractic treatment that are incompatible with accepted chiropractic practice and paying unconscionably inadequate reimbursements for services.

93. Trigon directs persons covered by healthcare plans that it administers to medical doctors by coveting services of medical doctors to a greater extent than those of chiropractors. Trigon has unreasonably limited the coverage of chiropractic treatment under healthcare plans that it administers and has characterized chiropractic as an alternative or nontraditional treatment. By denigrating chiropractic treatment and by unreasonably limiting the coverage of chiropractic treatment under healthcare plans that it administers, Trigon has wrongfully interfered with the choice of persons covered by healthcare plans that Trigon administers to elect to be treated by a doctor of chiropractic.

Trigon's Unreasonable Conditions on and Unconscionable Reimbursement for Chiropractic Discourage Chiropractors from Providing Services to Persons Covered by Healthcare Plans Administered by Trigon

Refusal to Cover Services of Chiropractic Assistants

94. For well more than fifty years, doctors of chiropractic have relied on trained chiropractic assistants to aid doctors of chiropractic in treating patients. The responsibilities of chiropractic assistants are limited to providing supplemental care that does not rise to the level of the practice of chiropractic. Service of chiropractic assistants is a long established and traditional part of chiropractic treatments.

95. Though chiropractic assistants have assisted doctors of chiropractic in the Virginia for many decades, the Commonwealth of Virginia has not and does not require that a person assisting a doctor of chiropractic as a chiropractic assistant obtain professional licensure. The Commonwealth of Virginia does not now and never has issued such a license.

96. Trigon refuses to reimburse the costs of services of chiropractic assistants because chiropractic assistants do not hold, because none are available, a professional license from the Commonwealth of Virginia. Doctors of chiropractic must either provide the services normally provided by chiropractic assistants themselves and seek reimbursement where available, or provide the services of a chiropractic assistant to a person covered by a healthcare plan administered by Trigon and receive no reimbursement for those services.

97. Trigon's refusal of reimbursement for the services of chiropractic assistants because the Commonwealth of

Virginia has not recognized a need for licensure of chiropractic assistants unfairly and unconscionably discriminates against doctors of chiropractic.

Unconscionably Low (Including Nothing) Reimbursement for Covered Chiropractic Treatment

98. The Trigon Ancillary Professional Provider Agreement requires doctors of chiropractic to accept amounts determined by Trigon as full payment for their services. Trigon has acted unconscionably in exploiting this requirement to impose predatory and punitively low reimbursements for the services of doctors of chiropractic, including no reimbursement at all.

99. The American Medical Association, an organization of medical doctors, has developed and published Physician's Current Professional Terminology ("CPT") codes that have been widely recognized and adopted as a basis for identifying healthcare services. The Commonwealth of Virginia has recognized the wide acceptance of those codes in requesting reimbursement from insurance companies for a healthcare provider's services. Va. Code Ann. §38.2-322(E). Trigon requires that providers submit requests for payment using CPT codes to identify the services for which payment is requested.

100. In 1997, the AMA adopted three CPT codes associated with treatments of different numbers of regions of the spine by doctors of chiropractic. Prior to 1997, only one CPT code was associated with spinal manipulation by a doctor of chiropractic.

101. The three CPT codes assigned in 1997 to chiropractic manipulation treatments of the spine ("CMT codes") each correspond to manipulation of a number of

regions of the spine, 1-2 for the lowest code, 3-4 for the next higher code, and 5 regions for the highest code.

102. A widely recognized standard for determining the value of the treatment represented by a CPT code is Medicare's Resource Based Relative Value System ("RBRVS"). An RBRVS value is assigned to each CPT code. The RBRVS value associated with a CPT code is based on the effort, training, and instruments that are required to provide the treatment represented by the CPT code.

103. Trigon represents that the amounts that it reimburses providers for treatments are set "using Medicare's Resource Based Relative Value System methodologies".

104. The CMT code that represents treatment of a larger number of regions of the spine by a doctor of chiropractic has a larger RBRVS value than a CMT code that represents treatment of fewer regions. The RBRVS value for the CMT code for treatment of 5 regions is more than 50% greater than the RBRVS value for the CMT code for treatment of 1 - 2 regions.

105. The CMT codes and associated RBRVS values adopted in 1997 are consistent with the CPT codes representing manipulations performed by a doctor of osteopathy ("OMT codes") and corresponding RBRVS values that have existed since prior to 1997. Like the RBRVS values associated with CMT codes adopted in 1997, the RBRVS values associated with OMT codes have been larger for OMT codes that represented manipulations of a greater number of regions and have been lower for OMT codes that represented manipulations of a smaller number of regions since prior to 1997.

106. Prior to 1997, Trigon reimbursed doctors of osteopathy consistently with the RBRVS values associated with OMT codes. Trigon reimbursed a greater amount for an OMT code having a larger RBRVS value than for an OMT code having a smaller RBRVS value.

107. After the CMT codes for chiropractic treatment were adopted in 1997 and replaced the single code that had previously represented spinal manipulation by a doctor of chiropractic, Trigon adopted a policy of ignoring the differences in RBRVS values between CPT codes for manual manipulation treatment by all providers who provide manual manipulation treatments of the spine. Trigon now reimburses only the amount associated with codes for the smallest number of regions regardless of the number of regions actually treated.

108. Under Trigon's policy, a doctor of chiropractic who determines that a patient covered by a Trigon healthcare plan requires treatment of more than two regions of the spine, the number represented by the CMT code having the lowest RBRVS value, and who treats all required regions, will be reimbursed by Trigon as though only two regions had been treated. Trigon's policy requires that a doctor of chiropractic who treats 3, 4, or 5 regions of a Trigon patient's spine will have treated 1, 2, or 3 regions of the spine for no reimbursement - i.e. free.

109. Trigon's policy most severely affects doctors of chiropractic because it limits reimbursement for the most important and most sought treatment provided by doctors of chiropractic, Though this policy applies to all practitioners who provide manual manipulation forms of treatment, including doctors of chiropractic, doctors of osteopathy, and physical therapists, other healthcare providers are not affected by this policy to the extent that doctors of chiropractic are affected because manual

manipulation is only one treatment provided by those other practitioners and is of lesser importance to the entirety of the their practice.

110. Even though this limitation on reimbursement affects doctors of osteopathy to a much lesser extent than doctors of chiropractic, doctors of osteopathy complained to Trigon about this 1997 change to a policy of refusing additional reimbursement for OMT codes representing additional treatment beyond the minimum number of regions. Trigon responded that its refusal to reimburse for treatment by manual manipulation of more than the minimum number of regions was intended to limit payments to chiropractors. Trigon suggested that other CPT codes for which doctors of osteopathy were authorized to bill and that are not authorized for chiropractors could be invoked so that osteopaths could avoid being economically disadvantaged by Trigon's anti-chiropractic policies.

Progressive Cuts in Reimbursement for Chiropractic Treatment

111. In addition to imposing a low limit for reimbursement for treatments primarily provided by doctors of chiropractic and refusing to reimburse doctors of chiropractic for treatment of a number of regions of the spine that is greater than the number covered by the CMT code having the lowest RBRVS value, Trigon has progressively diminished the amount that is reimbursed for services by doctors of chiropractic.

112. Trigon has, over a period of years, progressively reduced payments for services provided by chiropractors by these policies and now pays for the services of doctors of chiropractic at a rate that is approximately 40% less than the rate at which services of medical doctors are compensated.

113. By reducing compensation paid to doctors of chiropractic, even to the point of reimbursing nothing at all for treatment of more regions of the spine than are covered by the CMT code having the lowest RBRVS value, Trigon has and is excluding doctors of chiropractic from providing services under a Trigon provider agreement. By making its conditions difficult or economically impossible for doctors of chiropractic to accept, Trigon is forcing doctors of chiropractic to reject Trigon's agreements, and thereby become a provider whose services Trigon tells its covered persons will cost them the most. Doctors of chiropractic are thus left with a Hobson's choice -- dictated by an unconscionable illegal tactic of Trigon and its medical physician co-conspirators -- between exclusion from Trigon networks or accepting unconscionably and unlawfully inadequate compensation for treating persons covered by Trigon healthcare plans.

Trigon Discourages Persons Covered by Trigon Healthcare Plans from Seeking Chiropractic Treatment

114. Healthcare plans administered by Trigon reimburse different amounts for services provided by different healthcare providers. This policy allows Trigon to direct and/or encourage persons covered by those healthcare plans to seek treatment from healthcare providers favored by Trigon and to discourage those persons from seeking treatment by healthcare providers that are disfavored by Trigon.

Trigon's Networks of Providers

115. Trigon encourages persons covered by healthcare plans administered by Trigon to seek treatment from providers who have agreed that Trigon may unilaterally determine the amount the provider will receive for services provided to those persons.

116. Trigon covers the largest portion of charges for a provider's services when services are provided by members of a "network" of healthcare providers. Membership in the network is controlled by Trigon. Trigon covers a significantly lesser portion of the charges for services provided by a provider who is not a member of the network but who has agreed that Trigon may determine the provider's fees for services. Trigon thereby penalizes covered persons who seek treatment from a provider who Trigon has not included in the network for the covered person's healthcare plan.

117. Trigon tells persons covered by Trigon's healthcare plans that they will be additionally penalized if they seek treatment from a provider who has not agreed that Trigon may set the amount that a provider must accept as full compensation for the provider's services. Trigon reimburses the same amount for treatment by a provider who has not agreed that Trigon may determine the provider's fees that it reimburses for treatment by a provider who has agreed that Trigon will determine the provider's fees but who is not a member of the covered person's provider network. However, Trigon informs covered persons that the covered person will be obligated to pay more to providers who have not agreed that Trigon may determine their fees than they would be obligated to pay a provider who has agreed that Trigon may determine provider's services.

Trigon's Cap on Reimbursement for Chiropractic Treatment

118. Trigon has imposed limitations and conditions on reimbursement for services rendered by doctors of chiropractic that discourage those covered by healthcare plans administered by Trigon from seeking chiropractic treatment.

119. Trigon has imposed a maximum annual payment of $500.00 per year for "spinal manipulations and other manual medical interventions." This cap applies to charges for chiropractic treatment and limits the amount of chiropractic care that a patient can receive before the patient is solely responsible for paying for chiropractic treatment.

120. No other healthcare providers limit their practice to noninvasive manual adjustment of the neuromusculoskeletal system to the extent that doctors of chiropractic focus treatment on manual adjustment.

121. This $500.00 limitation on coverage for a treatment primarily rendered by doctors of chiropractic clearly directs patients suffering low back pain and other conditions which are regularly and successfully treated by doctors of chiropractic to seek treatments that are not subject to severe coverage limitations, principally treatments offered by medical doctors. This cap on coverage of chiropractic treatment penalizes patients who seek chiropractic treatment rather than treatment offered by a medical doctor. One court has held that such limitations are clearly discriminatory and directed to excluding doctors of chiropractic. Nosser v. Health Fund Trust Fund Bd., 666 So.2d 1272 (La.Ct. App. 1996).

Trigon Offers Additional Coverage of Chiropractic as a Treatment that is Excluded from the Scope of Primary Care

122. Trigon offers chiropractic treatment to those covered by Trigon healthcare plans characterizing doctors of chiropractic as "alternative medicine practitioners" Trigon offers this access to chiropractic treatment "[a]s a service, not a covered benefit." This program that Trigon offers requires that persons seeking chiropractic treatment to pay 75% of the charge for treatment.

123. The effect of this program and Trigon's characterization of chiropractic services offered by this program is to portray chiropractic treatment as not "traditional medicine," and a costly additional treatment that is outside the scope of healthcare services that are covered by Trigon healthcare plans.

Combination and Conspiracy in Restraint of Trade

124. By limiting the coverage of chiropractic treatment to a cost that is less than the covered cost of treatments by a medical doctor, and seeking to exclude chiropractors from its networks of providers by refusing to pay for recognized and accepted chiropractic services and by paying unreasonably and unconscionably inadequate reimbursement for those chiropractic treatments that are covered, Trigon has unreasonably restricted access to doctors of chiropractic by those covered by Trigon healthcare plans.

125. Trigon's acts and policies discriminating against doctors of chiropractic, particularly in view of the number of persons covered by Trigon healthcare plans and the number of doctors of chiropractic wrongfully injured by Trigon's discriminatory policies and acts, substantially and adversely affect interstate commerce.

126. All acts of Trigon restraining access to doctors of chiropractic by persons covered by Trigon healthcare plans are or were approved by, encouraged by, and/or suggested by competing medical doctors who advise Trigon, including those medical doctors holding positions on the Provider Policy Committee of the Board of Directors of Trigon Healthcare, Inc.

127. These medical doctors have conspired with Trigon to restrict access to doctors of chiropractic by persons

covered by Trigon healthcare plans to further the interests of medical doctors with whom doctors of chiropractic compete in treating neuromusculoskeletal abnormalities of the spine.

128. All acts of Trigon restraining access to doctors of chiropractic by persons covered by Trigon healthcare plans were approved by and aided by Blue Cross and Blue Shield Association including by allowing economically powerful Blue Cross/Blue Shield marks to be used to increase the enrollment in Trigon healthcare plans that discriminate against and restrict access to doctors of chiropractic.

129. The anti-chiropractic policies that Trigon has adopted and enforced have harmed competition by restricting the access of a large percentage of the population of Virginia to the entire licensed healthcare profession of chiropractic.

130. Trigon's anti-chiropractic policies have caused persons covered by Trigon healthcare plans who desired and/or needed chiropractic care, to either fail to visit a chiropractor or to fail to visit a chiropractor with the regularity required for adequate care. Trigons's anti-chiropractic policies have harmed those persons.

131. Trigon's anti-chiropractic policies have restricted access to doctors of chiropractic of persons who would have sought treatment from a doctor of chiropractic but for Trigon's policies. Trigon's anti-chiropractic policies have required chiropractors to accept unconscionably inadequate reimbursement for treating Trigon covered patients including no compensation at all. Therefore, chiropractors have suffered harm from lost opportunities and services rendered without fair and adequate compensation as a result of Trigon's anti-chiropractic policies.

132. The anti-chiropractic policies adopted and enforced by Trigon and its competitive medical physicians have created an illegal boycott of chiropractic and are a concerted refusal to deal with the chiropractic profession.

133. Trigon, medical doctors, and Blue Cross and Blue Shield Association have engaged in an unlawful combination and conspiracy in restraint of trade in violation of 15 U.S.C. § 1.

Count II - Attempt to Monopolize

134. Plaintiffs repeat the allegations of paragraphs 1 - 65, 67 - 133.

135. The acts of Trigon, Blue Cross and Blue Shield Association, and medical doctors are attempts to monopolize in furtherance of a conspiracy to monopolize the submarket for treatment of neuromusculoskeletal conditions of the back of the market for healthcare services in violation of 15 U.S.C. § 2.

Violation of the Racketeer Influenced and Corrupt Organizations Act

136. Plaintiffs repeat the allegations of paragraphs 1 - 65, 67 - 133.

137. Plaintiffs are "persons" within the meaning of 18 U.S.C. §§1961(3) and 1964(c).

138. Trigon Healthcare, Inc. and its subsidiaries including Trigon Insurance, Inc., Trigon Administrators, Inc., Mid-South Insurance Company, and Trigon Health and Life Insurance Company are each and are and have been collectively a "person" within the meaning of 18 U.S.C. §§1961(3) and 1962(a).

139. Trigon Healthcare, Inc. and its subsidiaries including Trigon Insurance, Inc., Trigon Administrators, Inc., Mid-South Insurance Company, and Trigon Health and Life Insurance Company are each and are and have been collectively an "enterprise" within the meaning of 18 U.S.C. §§1961(4) and 1962(a) that are and have been engaged in, or the activities of which affect and have affected, interstate commerce within the meaning of 18 U.S.C. §1962(a).

140. Trigon Healthcare, Inc. and its subsidiaries have engaged in a pattern of racketeering activity within the meaning of 18 U.S.C. §§1961(1), 1961(5), and 1962(a).

Trigon's Extortionate Scheme - Violations of the Hobbs Act and the Virginia Extortion Statute

141. As alleged at paragraphs 70 through 72 above, Trigon healthcare plans cover a significant portion, about a third, of the population of Virginia, more than 40 % of the persons in Virginia who are covered by private health insurance. Moreover, more than 90% of the competitive medical physicians in Virginia benefit from Trigon's illegal actions.

142. Persons covered by Trigon healthcare plans first and primarily seek healthcare services that are covered to the greatest amount by their Trigon healthcare plan.

143. Trigon enjoys significant power in the market for healthcare services in Virginia, and particularly in the submarket for treatment of neuromusculoskeletal conditions of the back, based on the significant portion of the population of Virginia who look for healthcare treatment that is covered by Trigon healthcare plans and based on Trigon's fight to determine what services are covered by Trigon healthcare plans and the extent to which providers' services are covered.

144. As averred in paragraphs 85 through 89 above, for a physician's services to be covered to the greatest extent by Trigon healthcare plans, Trigon requires that a physician agree that Trigon will unilaterally determine the amount that is payment in full for the physician's services.

145. As set forth by paragraphs 98 through 113 above, Trigon has abused its rights under contracts with doctors of chiropractic by paying, since at least as early as 1998, unconscionably low reimbursements to doctors of chiropractic, including nothing at all, for services that doctors of chiropractic provide to patients covered by Trigon healthcare plans.

146. Since at least 1998, doctors of chiropractic have requested reimbursement from Trigon for treatment that was reported by CMT codes that represent treatment of more regions of the spine than are covered by the CMT code for the minimum number of regions.

147. Though Trigon has repeatedly received reimbursement requests reporting treatment of more regions of the spine than the number covered by the minimum CMT code, Trigon has reimbursed only for treatment of the regions covered by the minimum CMT code and has refused to pay any reimbursement for treatment of the regions beyond those covered by the minimum CMT code.

148. At least a significant portion of the nearly 95% of the physicians in Virginia, including doctors of chiropractic, who have agreed that Trigon will unilaterally determine the amount that the physician must accept as payment in full for the physician's services have done so based on fear of severe economic loss that they would incur if they were excluded by Trigon from the scope of the greatest coverage of Trigon healthcare plans. Exclusion from the greatest

scope of coverage would mean that the significant coercive pressure that Trigon exerts on the people covered by Trigon administered healthcare plans would direct those people away from the excluded physician and to physicians who have agreed to Trigon's terms and who are part of the covered person's Trigon network of providers.

149. At least a significant portion of the nearly 95% of the physicians in Virginia, including doctors of chiropractic, who have agreed that Trigon may unilaterally determine the amount that they must accept as full payment for their services have done so based on fear that their reputation could be perceived to be diminished as a consequence of not providing services that are within the greatest coverage of healthcare plans sold under the Blue Cross/Blue Shield marks.

150. Trigon knows that physicians who have agreed that Trigon may unilaterally determine the amount that they must accept as full payment for their services have done so based on fear of economic loss should they refuse to agree to Trigon's terms and be excluded from networks of providers for Trigon healthcare plans.

151. Trigon represents that specified costs of healthcare are covered Trigon healthcare plans. To those who are covered by a Trigon healthcare plan, the value of that plan is based on the services that are available and the extent to which those services are covered by the plan. Doctors of chiropractic directly benefit Trigon by treating persons covered by Trigon healthcare plans and provide that treatment as a service that is covered by the Trigon healthcare plan.

152. Doctors of chiropractic have treated persons covered by Trigon healthcare plans knowing that Trigon would refuse any reimbursement for some services. Doctors

of chiropractic have provided those services based on a reasonable fear of economic loss that would result from exclusion as a provider to Trigon's programs should they refuse to treat persons covered by Trigon administered healthcare plans for free.

153. Trigon knows that doctors of chiropractic have treated and continue to treat patients covered by Trigon healthcare plans knowing that Trigon will refuse to provide any reimbursement for some services because doctors of chiropractic fear the economic loss that would result from exclusion as a provider to Trigon's programs. Trigon has exploited and continues to exploit that fear to obtain treatments without any cost to Trigon for persons for whom Trigon is obligated to cover healthcare services.

154. Trigon has no legal right to refuse to pay reasonable compensation to doctors of chiropractic for services that are covered by Trigon healthcare plans and that are provided to those who are covered by Trigon healthcare plans by doctors of chiropractic.

155. Trigon has coerced doctors of chiropractic with fear of economic loss into providing services, repeatedly since at least 1998, without reasonable compensation in violation of both federal[1] and Virginia law, 18 US.C. §1951, and Virginia, Va. Ann. Code §18.2-59.

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1 *See* Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494 (3rd Cir. 1998).

156. Plaintiffs ACA's and VCA's member doctors of chiropractic have been deprived of property, and injured in their business of the practice of chiropractic by succumbing to Trigon's coercion to provide healthcare services for less than reasonable compensation, including none at all.

157. Trigon has used funds that it has wrongfully refused to pay to doctors of chiropractic as compensation for services provided to persons covered by Trigon healthcare plans to pay for services of medical doctors who compete with doctors of chiropractic in the market for healthcare services and particularly in the submarket for treatment of neuromusculoskeletal conditions of the back.

158. Trigon has used funds that it has wrongfully refused to pay to doctors of chiropractic as compensation for services provided to persons covered by Trigon healthcare plans to lower the costs of the healthcare plans that it sells and thereby enroll greater numbers of persons within healthcare plans that do not pay doctors of chiropractic reasonable compensation for healthcare services.

159. Plaintiffs ACA's and VCA's member doctors of chiropractic and plaintiff doctors of chiropractic have been deprived of property and injured in their business of the practice of chiropractic by Trigon's use of funds that it has wrongfully refused to pay to doctors of chiropractic as compensation for services provided to persons covered by Trigon healthcare plans to operate and expand its enterprise thereby increasing its ability to apply coercive pressure to patients not to seek chiropractic treatment and its ability to coerce doctors of chiropractic to accept unfair and unreasonable compensation for treating persons who are covered by Trigon healthcare plans.

Trigon's Scheme to Defraud - Mail Fraud, Wire Fraud, and Securities Fraud

160. Trigon represents that it reimburses providers of healthcare services for covered services based on RBRVS methodologies or guided by RBRVS values.

161. Trigon has made these representations in documents deposited for delivery by the United States Postal Service and in documents transmitted by wire in interstate commerce, including documents filed with the Securities and Exchange Commission.

162. Trigon intends these representations to be relied on by persons who purchase healthcare plans sold by Trigon or who engage Trigon to administer a healthcare plan according to Trigon's policies as an assurance that providers of healthcare services will be fairly compensated for providing treatment to persons who are covered by the healthcare plan.

163. Trigon intends these representations to be relied on by persons covered by Trigon healthcare plans as an assurance that providers of healthcare services under Trigon healthcare plans will be fairly compensated for providing covered treatments to those persons.

164. Trigon intends these representations to be relied on by providers of healthcare services to Trigon healthcare plans as an assurance that the providers will be fairly compensated for treatment provided to persons who are covered by Trigon healthcare plans.

165. Trigon intends these representations to be relied on by members of the public who invest in securities issued by Trigon Healthcare, Inc. that are sold to the public as an assurance that Trigon's business is based on providing

healthcare services for which providers are fairly compensated.

166. Trigon does not compensate doctors of chiropractic for chiropractic manipulation treatments based on RBRVS methodologies or guided by RBRVS values assigned to CMT codes. Trigon completely ignores the values associated with treatment of a greater number of regions of the spine than are associated with the minimum treatment CMT code. Trigon, in effect, converts to zero the values added to the RBRVS value for the minimum treatment CMT code to arrive at the higher RBRVS values of the CMT codes representing treatment of more regions of the spine.

167. Ignoring incremental RBRVS values representing the difference between treatment of the minimum number of regions of the spine and treating a greater number of regions cannot fairly or reasonably be characterized as being guided by RBRVS values or based on RBRVS methodologies. It is completely ignoring the values and methodologies.

168. Trigon's representations that it pays providers of healthcare services covered by Trigon healthcare plans based on RBRVS methodologies or guided by RBRVS values are false.

169. Trigon knows that its representations that it pays providers of healthcare services covered by Trigon healthcare plans based on RBRVS methodologies or guided by RBRVS values are false.

170. Persons covered by Trigon healthcare plans have relied on these false statements as an assurance that providers of healthcare services under Trigon healthcare plans will be fairly compensated for providing those

persons treatment that is covered by the Trigon healthcare plan.

171. Persons who have purchased healthcare plans sold by Trigon or who have engaged Trigon to administer a healthcare plan according to Trigon's policies have purchased healthcare plans or engaged Trigon to administer healthcare plans relying on those false statements as an assurance that providers of healthcare services will be fairly compensated for treating persons who are covered by the Trigon healthcare plan.

172. Providers of healthcare services to Trigon healthcare plans have relied on these false statements when entering into agreements with Trigon as an assurance that they will be fairly compensated for treatment provided to persons who are covered by Trigon healthcare plans.

173. Members of the public have invested in securities issued by Trigon Healthcare, Inc. relying on those false statements as an assurance that Trigon's business is based on fairly compensating healthcare providers for treating persons who are covered by Trigon healthcare plans.

174. Trigon knows of and has exploited that reliance on its false statements in selling healthcare plans and administration services, in encouraging physicians to agree to provide healthcare services to persons covered by Trigon's healthcare plans, in encouraging persons to seek to be covered by Trigon's healthcare plans, and in selling securities to the public.

175. Trigon has engaged in repeated and numerous acts constituting mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343.

176. Trigon has engaged in securities fraud in violation of 15 U.S.C. §77q(a).

177. Trigon has used funds that it has received from purchasers of healthcare plans and from the investing public who relied on Trigon's false statements as an assurance that providers of healthcare services will be fairly compensated for treating persons who are covered by Trigon healthcare plans to pay for services of medical doctors who compete with doctors of chiropractic in the market for healthcare services, and particularly in the submarket for treatment of neuromusculoskeletal conditions of the back.

178. Trigon has used funds that it has received from purchasers of healthcare plans and from the investing public who relied on Trigon's false statements as an assurance that providers of healthcare services will be fairly compensated for treating persons who are covered by Trigon healthcare plans to lower the costs of the healthcare plans that it sells and thereby enroll greater numbers of persons within healthcare plans that do not pay doctors of chiropractic reasonable compensation for healthcare services.

179. Plaintiffs ACA, VCA, and member doctors of chiropractic have been injured by the increase in the number of persons covered by Trigon healthcare plans as a result of Trigon's false statements in two ways: 1)Trigon can now coerce more people to seek medical rather than chiropractic treatment; and 2) Trigon can apply even greater pressure to doctors of chiropractic to accept unfair and unreasonable compensation for treating persons who are covered by Trigon healthcare plans.

180. Trigon has used funds that it has received from purchasers of healthcare plans, from purchasers of administration services, and from the investing public, all of whom relied on Trigon's false statements as an assurance

that providers of healthcare services will be fairly compensated for treatment provided to persons who are covered by Trigon healthcare plans, to operate and expand its enterprise thereby increasing its ability to apply coercive pressure to more persons not to seek chiropractic treatment and increasing the coercive pressure that Trigon applies to doctors of chiropractic to accept unfair and unreasonable compensation for treating persons who are covered by Trigon healthcare plans.

181. Plaintiffs ACA's and VCA's member doctors of chiropractic and plaintiff doctors of chiropractic have been deprived of property and injured in their business of the practice of chiropractic by Trigon's use of funds that it has received from purchasers of healthcare plans and administration services and from the investing public, all of whom relied on Trigon's false statements as an assurance that providers of healthcare services will be fairly compensated for treatment provided to persons who are covered by Trigon healthcare plans.

182. Trigon has wrongfully deprived plaintiffs ACA's and VCA's member doctors of chiropractic and the plaintiff doctors of chiropractic of property and injured them in their business of the practice of chiropractic by depriving them of access to patients and of reasonable compensation for chiropractic treatment by a pattern of wrongful conduct including numerous and repeated violations of 18 U.S.C. §§1341, 1343.

183. Trigon has wrongfully deprived plaintiffs ACA's and VCA's member doctors of chiropractic and the plaintiff doctors of chiropractic of property, within the scope of 18 U.S.C. §1951(b)(2).

184. Trigon's repeated violations of 18 U.S.C. §§ 1341, 1343, and 1951 is a pattern of violations in support an unlawful scheme to deny doctors of chiropractic access to patients by increasing the number of persons who are covered by healthcare plans sold and/or administered by Trigon, coercing those persons not to seek chiropractic care, and requiring doctors of chiropractic to accept unreasonable and unfair conditions to be included within Trigon's healthcare plans.

185. Trigon has continued since at least 1997 and unless enjoined by this Court will continue this pattern of unlawful acts, including continuing violations of 18 U.S.C. §§ 1341, 1343, and 1951, in support of its unlawful scheme.

186. Plaintiffs ACA's and VCA's members plaintiff doctors of chiropractic have been deprived of property and injured in their business of the practice of chiropractic by Trigon's violations of 18 US.C. §1341, 1343, 1951, and 15 U.S.C. §77q(a).

187. Plaintiffs ACA, VCA, their members doctors of chiropractic, and plaintiff doctors of chiropractic have been injured in their businesses by Trigon's use of the proceeds received as a result of its pattern of violations of 18 U.S.C. §1341, 1343, 1951, and 15 U.S.C. §77q(a) within the meaning of 18 U.S.C. §1964(c).

Count IV- Tortious Interference with Business Expectancy

188. Plaintiffs repeat the allegations of paragraphs 1 - 65, 67 - 121,135 - 184.

189. Doctors of chiropractic have a reasonable expectation that some people who suffer from conditions that may be treated by chiropractic will seek treatment by a licensed doctor of chiropractic.

190. Doctors of chiropractic have a reasonable expectation that they will receive reasonable compensation for providing chiropractic treatments to patients who seek chiropractic care.

191. Doctors of chiropractic and patients of doctors of chiropractic have a reasonable expectation that the doctor/patient relationships will not be interfered with by third parties.

192. Trigon knows that some people who are covered by Trigon healthcare plans who suffer from conditions that may be treated by chiropractors would seek treatment by a doctor of chiropractic.

193. Trigon knows that doctors of chiropractic have a reasonable expectation that some people who are covered by Trigon healthcare plans and who suffer from conditions that may be treated by chiropractors, will seek treatment by a doctor of chiropractic.

194. Trigon also knows that doctors of chiropractic have formed doctor/patient relationships with certain people for whom chiropractic treatments have been effective in treating conditions and that those doctors of chiropractic have a reasonable expectation that the relationship will not be interfered with by third parties.

195. Trigon knows that doctors of chiropractic have a reasonable expectation that some people who are covered by Trigon healthcare plans and who have established a doctor/patient relationship with a doctor of chiropractic will continue to seek treatment by the doctor of chiropractic.

196. Trigon knows that doctors of chiropractic have a reasonable expectation that they will receive reasonable compensation for providing chiropractic treatments in the past, present, and future.

197. Trigon has instituted the policies, including those described by paragraphs 114 -123 above, that discourage persons covered by Trigon healthcare plans from seeking or continuing treatment by a doctor of chiropractic.

198. Trigon has also damaged the relationships of doctors of chiropractic and their patients by questioning without adequate basis the medical necessity of chiropractic treatment and informing patients that the medical necessity of chiropractic treatment was being questioned.

199. Trigon's chiropractic reimbursement policies have discouraged and/or prevented persons covered by Trigon healthcare plans who would benefit from chiropractic treatment from seeking that treatment, from obtaining the number of treatments that would be most appropriate for the patient's condition, from seeking treatment as soon as would be most appropriate for the patient's condition, and/or from seeking any additional chiropractic treatment because the five hundred dollar cap instituted by Trigon for chiropractic services had been reached.

200. Trigon's policies have interfered with the normal business and contractual relations and expectations of ACA's and VCA's member doctors of chiropractic and plaintiff doctors of chiropractic in the business and practice of providing chiropractic treatment to persons covered by Trigon healthcare plans.

201. Trigon has interfered with the reasonable contractual and business expectations of doctors of chiropractic pursuant to a conspiracy, as alleged at

paragraphs 73 - 80 and 124 - 133, with medical doctors who are in competition with doctors of chiropractic.

202. Trigon, as evidenced by its acts as alleged herein, intends to marginalize, diminish, and ultimately effectively eliminate doctors of chiropractic as healthcare providers.

203. Trigon's interference with the business expectations of doctors of chiropractic in their businesses of the practice of chiropractic has been malicious and wanton, and has caused and will cause financial and other damage to plaintiffs and other chiropractors and their patients.

Count V- Violation of Va. Ann. Code §§18.2-499

204. Plaintiffs repeat the allegations of paragraphs 1 - 65, 67 - 133, 135, 137 - 187, 189 – 203.

205. Trigon has combined with medical doctors and Blue Cross and Blue Shield Association, as set forth by paragraphs 73 - 84 above, to injure doctors of chiropractic in their businesses within Virginia.

206. Trigon and those with whom it has combined have acted willfully and maliciously to injure doctors of chiropractic in their businesses as set forth by the facts alleged above, including preventing persons from lawfully seeking chiropractic care.

207. The actions of Trigon and those who have acted in combination with Trigon are intended and designed to harm chiropractors in their trade, business, reputation, profession.

208. Trigon is liable to plaintiffs pursuant to Va. Ann. Code §18.2-500.

Count VI - Breach of Contract with Doctors of Chiropractic

209. Plaintiffs repeat the allegations of paragraphs 1 - 65, 85 - 88, 98 - 113.

210. Trigon has entered into contracts with doctors of chiropractic, including plaintiffs, as set out by paragraphs 85 - 88 providing that doctors of chiropractic will provide treatments to persons covered by Trigon healthcare plans.

211. Those contracts are governed by and construed and enforced in accordance with the laws of the Commonwealth of Virginia.

212. Those contracts obligate Trigon Insurance Co., Trigon Administrators, Inc., Mid-South Insurance Company, and Trigon Health and Life Insurance Company, subsidiaries of Trigon Healthcare, Inc., to pay or administer payment to doctors of chiropractic for services provided to persons covered by healthcare plans that were sold and/or administered by Trigon Insurance Co., and the other named subsidiaries of Trigon Healthcare, Inc.

213. Those contracts obligate the doctors of chiropractic to accept as payment in full the amount determined by Trigon Insurance Co. and other named subsidiaries of Trigon Healthcare, Inc.

214. There is an obligation in contract implied by the law of the Commonwealth of Virginia to pay reasonable compensation for services that are requested and accepted.

215. By entering into a contract to provide chiropractic services to persons covered by healthcare plans that were sold and/or administered by them and by entering into agreements with doctors of chiropractic to provide covered services to persons covered by healthcare plans sold and/or

administered by them, Trigon Insurance Co., Trigon Administrators, Inc., Mid-South Insurance Company, and Trigon Health and Life Insurance Company requested that doctors of chiropractic provide services to persons covered by their healthcare plans as requested by those persons.

216. As set out by paragraphs 98 - 113, Trigon Insurance Co. and the other named subsidiaries of Trigon Healthcare, Inc. have refused to pay any compensation to doctors of chiropractic for treatment of a number of regions of a patient's spine in excess of those covered by the CMT code for the smallest number of regions.

217. Trigon has breached the contract implied in law to pay reasonable compensation for services of doctors of chiropractic including contracts with plaintiffs ACA's and VCA's member doctors of chiropractic and plaintiff doctors of chiropractic.

Count VII --Common Law Conspiracy to Injure the Practices of Doctors of Chiropractic

218. Plaintiffs repeat the allegations of paragraphs 1 - 65, 67 - 132, 135, 137 - 187, 189-203, 205 -207, and 210-217.

219. Trigon, medical doctors, and Blue Cross and Blue Shield Association have conspired to injure the practices of doctors of chiropractic by restricting access to doctors of chiropractic of a significant portion of the population of Virginia and by wrongfully discouraging persons from seeking chiropractic treatment.

220. Trigon has committed wrongful acts in furtherance of the conspiracy to injure the practices of doctors of chiropractic that have deprived doctors of chiropractic of opportunities to treat patients whose condition was appropriate for chiropractic care and have

deprived doctors of chiropractic of reasonable compensation for chiropractic treatment provided to persons who are covered by healthcare plans that were sold and/or administered by Trigon.

221. Plaintiffs ACA's and VCA's members doctors of chiropractic and plaintiff doctors of chiropractic have been damaged by the acts of Trigon in furtherance of the conspiracy to injure the practices of doctors of chiropractic.

Violation of the Insurance Equality Laws of the Commonwealth of Virginia

222. All of the allegations above are herein realleged and incorporated herein.

223. The acts complained of and in particular capping chiropractic care benefits and paying doctors of chiropractic only 60% of the fee schedule paid to other providers for the ame or similar services violates Va. Ann. Code §§38.2-2203, 38.2-3408, 38.2-4221, and 38.2-4312(E).

224. Plaintiffs have been damaged and injured as a result of these violations by defendants and pray for damages and relief as set forth below.

Trial by Jury Demanded

225. Plaintiffs demand a trial by jury of all issues that may be so tried. WHEREFORE, plaintiffs pray this Court for the following relief

A. An Order restraining and enjoining defendants, preliminarily and permanently, from engaging in the unfair and unlawful acts and practices alleged in this complaint;

B. That defendants be ordered, jointly and severally, to pay three times actual damages pursuant to 15 U.S.C. § 15, 18 U.S.C. § 1964(c), and Va. Ann. Code § 18.2-500(a);

C. That defendants be ordered to pay plaintiffs' costs and attorneys' fees pursuant to 15 U.S.C. § 15, 18 U.S.C. §1964(c), and Va. Ann. Code §18.2-500(a);

E. For an award of punitive damages from Trigon Healthcare, Inc.; and

F. For such other and further relief as may be just and proper.

Respectfully submitted,

Date: January 8, 2002

/s/ Steven J. Hampton
George P. McAndrews
Steven J. Hampton
Patrick J. Arnold Jr.
Sharon A. Hwang
Ronald A. Dicerbo
McAndrews, Held & Malloy, Ltd.
500 West Madison Street, 34th Floor
Chicago, Illinois 60661
(312) 775-8000

Thomas R. Daly
Virginia State Bar # 19942
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway Suite 1100
Fairfax, Virginia 22031
(703) 218 - 2110

William G. Shields
Virginia State Bar # 14200
William G. Shields & Associates
601 North Courthouse Rd., Suite 1
Richmond, Virginia 23236
(804) 897-4497

Attorneys for Plaintiffs, American Chiropractic Association, Virginia Chiropractic Association

CERTIFICATE OF SERVICE

I hereby certify that on the date this proof of service is signed below, I served the foregoing

PLAINTIFFS' MOTION PURSUANT TO RULE 15(a) FED. R. CIV. P. FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

in the above identified action, addressed as follows:

Howard Feller, Esq.
McGuire Woods LLP
One James Center
901 East Cary Street
Richmond, VA 23219
Facsimile: (804) 775-1061

	(BY MAIL) By placing a true copy thereof enclosed in a sealed envelope. I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail.
	(BY PERSONAL SERVICE) By placing a true copy thereof enclosed in a sealed envelope. I caused each such envelope to be delivered by hand to the addressee(s) noted above.
	(BY FACSIMILE) I caused the said document to be transmitted by facsimile machine to the number indicated after the address(s) noted above.
X	(BY FEDERAL EXPRESS) By placing a true copy thereof in a sealed envelope and by causing such envelope to be placed in the Federal Express depository at Chicago, Illinois.

Richard E. Ladd, Jr. Esq.
Penn, Stuart & Eskridge
Post Office Box 2009
Bristol, VA 24203
Facsimile: (540) 466-8672

X	(BY MAIL) By placing a true copy thereof enclosed in a sealed envelope. I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail.
	(BY PERSONAL SERVICE) By placing a true copy thereof enclosed in a sealed envelope. I caused each such envelope to be delivered by hand to the addressee(s) noted above.
	(BY FACSIMILE) I caused the said document to be transmitted by facsimile machine to the number indicated after the address(s) noted above.
	(BY FEDERAL EXPRESS) By placing a true copy thereof in a sealed envelope and by causing such envelope to be placed in the Federal Express depository at Chicago, Illinois.

Date: January 8, 2002 /s/ Steven J. Hampton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Abingdon Division

American Chiropractic Association, Inc., et al.,)
)
Plaintiffs,)
)
v.)
)
Trigon Healthcare, Inc., et al.,)
)
Defendants.)
)

Civil Action No. 1:00cv00113

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANTS TRIGON HEALTHCARE, INC., TRIGON INSURANCE CO., TRIGON ADMINISTRATORS, INC., MID-SOUTH INSURANCE COMPANY AND TRIGON HEALTH AND LIFE INSURANCE COMPANY TO PLAINTIFFS' THIRD AMENDED COMPLAINT

R. Gordon Smith (VSB #5925)
Howard Feller (VSB #18248)
Bryan A. Fratkin (VSB #38933)
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000 (phone)
(804) 775-1061 (fax)

Richard E. Ladd, Jr. (VSB #30409)
Penn, Smart & Eskridge
Post Office Box 2009
Bristol, Virginia 24201
540-466-4800 (phone)
540-466-8672 (fax)

Counsel for: Trigon Healthcare, Inc.
Trigon Insurance Co.
Trigon Administrators, Inc.
Mid-South Insurance Company
Trigon Health and Life Insurance Company

Defendants Trigon Healthcare, Inc., Trigon Insurance Co., Trigon Administrators, Inc., Mid-South Insurance Company and Trigon Health and Life Insurance Company (collectively, "Trigon") state as follows for their Answer and Affirmative Defenses to Plaintiffs' Third Amended Complaint:

Answer

1. Trigon admits that Plaintiffs purport to bring this cause of action based on the allegations set forth in paragraph 1 of the Complaint, but denies the allegations in paragraph 1 of the Complaint and denies that Plaintiffs have pled or can prove any valid cause of action against Trigon on any ground whatsoever.

2. Trigon admits that Plaintiffs seek to bring this action on behalf of the parties as set forth in paragraph 2 of the Complaint, and admits that Plaintiffs seek damages as set forth in paragraph 2 of the Complaint, but denies the allegations in paragraph 2 of the Complaint, denies that Plaintiffs have standing to bring this action and denies that Plaintiffs have pled or can prove any valid cause of action against Trigon on any grounds whatsoever.

3. Trigon denies the allegations in paragraph 3 of the Complaint to the extent they relate to Trigon. Trigon is without "knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 3 of the Complaint and, therefore, these allegations are deemed denied.

4. Trigon denies the allegations in paragraph 4 of the Complaint.

5. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the Complaint and, therefore, these allegations are deemed denied.

6. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the Complaint and, therefore, these allegations are deemed denied.

7. Upon information and belief, Trigon admits the allegations in paragraph 7 of the Complaint.

8. Upon information and belief, Trigon admits the allegations in paragraph 8 of the Complaint.

9. Upon information and belief, Trigon admits the allegations in paragraph 9 of the Complaint.

10. Upon information and belief, Trigon admits the allegations in paragraph 10 of the Complaint.

11. Upon information and belief, Trigon admits the allegations in paragraph 11 of the Complaint.

11.1. Upon information and belief, Trigon admits the allegations in paragraph 11.1 of the Complaint.

11.2. Upon information and belief, Trigon admits the allegations in paragraph 11.2 of the Complaint that Plaintiff George B. McClelland is a chiropractor licensed to practice in Virginia, has provided chiropractic treatment to patients who are insured by Trigon and has an office in Christiansburg, Virginia. Trigon denies the remaining allegations in paragraph 11.2 of the Complaint.

11.3. Upon information and belief, Trigon admits the allegations in paragraph 11.3 of the Complaint that Plaintiff James M. Porter is a chiropractor licensed to practice in Virginia and has an office in Christiansburg, Virginia. Based on information currently available to Trigon, Trigon denies the remaining allegations in paragraph 11.3 of the Complaint.

11.4. Upon information and belief, Trigon admits the allegations in paragraph 11.4 of the Complaint.

11.5. Upon information and belief, Trigon admits the allegations in paragraph 11.5 of the Complaint that Plaintiff Wendy Holden Willis is a chiropractor licensed to practice in Virginia and has an office in Wytheville, Virginia. Based on information currently available to Trigon, Trigon denies the remaining allegations in paragraph 11.5 of the Complaint.

11.6. Upon information and belief, Trigon admits the allegations in paragraph 11.6 of the Complaint.

11.7. Upon information and belief, Trigon admits the allegations in paragraph 11.7 of the Complaint that Plaintiff Kevin J. Westby is a chiropractor licensed to practice in Virginia and has an office in Hampton, Virginia.

Based on information currently available to Trigon, Trigon denies the remaining allegations in paragraph 11.7 of the Complaint.

12. Trigon admits the allegation in paragraph 12 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 12 of the Complaint and, therefore, these allegations are deemed denied.

13. Trigon admits the allegation in paragraph 13 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 13 of the Complaint and, therefore, these allegations are deemed denied.

14. Trigon admits the allegation in paragraph 14 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 14 of the Complaint and, therefore, these allegations are deemed denied.

15. Trigon denies the allegation in paragraph 15 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 15 of the Complaint and, therefore, these allegations are deemed denied.

16. Trigon denies the allegation in paragraph 16 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 16 of the Complaint and, therefore, these allegations are deemed denied.

17. Trigon admits the allegation in paragraph 17 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 17 of the Complaint and, therefore, these allegations are deemed denied.

18. Trigon denies the allegation in paragraph 18 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 18 of the Complaint and, therefore, these allegations are deemed denied.

19. Trigon denies the allegation in paragraph 19 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 19 of the Complaint and, therefore, these allegations are deemed denied.

20. Trigon admits the allegation in paragraph 20 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 20 of the Complaint and, therefore, these allegations are deemed denied.

21. Trigon admits the allegation in paragraph 21 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 21 of the Complaint and, therefore, these allegations are deemed denied.

22. Trigon admits the allegation in paragraph 22 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 22 of the Complaint and, therefore, these allegations are deemed denied.

23. Trigon admits the allegation in paragraph 23 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 23 of the Complaint and, therefore, these allegations are deemed denied.

24. Trigon admits the allegation in paragraph 24 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 24 of the Complaint and, therefore, these allegations are deemed denied.

25. Trigon admits the allegation in paragraph 25 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 25 of the Complaint and, therefore, these allegations are deemed denied.

26. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26 of the Complaint and, therefore, these allegations are deemed denied.

27. No response is required to paragraph 27 of the Complaint because it contains no averments.

28. Trigon admits the allegation in paragraph 28 of the Complaint that Plaintiff is covered by a health care plan administered by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 28 of the Complaint and, therefore, these allegations are deemed denied.

29. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 29 of the Complaint and, therefore, these allegations are deemed denied.

30. Trigon admits the allegations in paragraph 30 of the Complaint, except denies that its principal place of business is in Richmond, Virginia.

31. Trigon admits the allegations in paragraph 31 of the Complaint.

32. Trigon admits the allegations in paragraph 32 of the Complaint that Trigon Administrators was a Virginia corporation and was wholly-owned by Trigon Healthcare, Inc., but denies that Trigon Administrators principal place of business is in Richmond, Virginia and denies that it has any current affiliation or relationship with Trigon.

33. Trigon admits the allegations in paragraph 33 of the Complaint that Mid-South Insurance Company was incorporated in the State of North Carolina and was wholly-

owned by Trigon Healthcare, Inc., but denies that Mid-South Insurance Company had its principal place of business in Richmond, Virginia and denies that it has any current affiliation or relationship with Trigon.

34. Trigon admits the allegation in paragraph 34 of the Complaint that Trigon Health and Life Insurance Company is a Virginia Corporation but denies the remaining allegations in paragraph 34 of the Complaint.

35. Trigon admits that Plaintiffs purport to invoke the Court's jurisdiction under the statutes cited, but denies the allegations in paragraph 36 of the Complaint.

36. Trigon admits that Plaintiffs purport to establish venue under the statutes cited, but denies the allegations in paragraph 37 of the Complaint.

37. Upon information and belief, Trigon admits the allegations in paragraph 35 of the Complaint.

38. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38 of the Complaint and, therefore, these allegations are deemed denied.

39. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39 of the Complaint and, therefore, these allegations are deemed denied.

40. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40 of the Complaint and, therefore, these allegations are deemed denied.

41. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41 of the Complaint and, therefore, these allegations are deemed denied.

42. As to the allegations in paragraph 42 of the Complaint, Trigon admits that Title 54.1 of the Code of Virginia, Chapter 29, Article 3, concerns the licensure of chiropractic. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 42 of the Complaint and, therefore, these allegations are deemed denied.

43. As to the allegations in paragraph 43 of the Complaint, Trigon states that Virginia Code § 54.1-2900 speaks for itself and denies the allegations to the extent they are inconsistent with the Virginia Code.

44. As to the allegations in paragraph 44 of the Complaint, Trigon states that Virginia Code § 2.1-20.1(A)(1) speaks for itself and denies the allegations to the extent they are inconsistent with the Virginia Code.

45. As to the allegations in paragraph 45 of the Complaint, Trigon states that Virginia Code § 38.2-2201.1 speaks for itself and denies the allegations to the extent they are inconsistent with the Virginia Code.

46. As to the allegations in paragraph 46 of the Complaint, Trigon states that Virginia Code §§ 38.2-2203, 38.2-3408, 38.2-4221 and 38.2-4312(E) speak for themselves and denies the allegations to the extent they are inconsistent with the Virginia Code.

47. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 47 of the Complaint and, therefore, these allegations are deemed denied.

48. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48 of the Complaint and, therefore, these allegations are deemed denied.

49. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 49 of the Complaint and, therefore, these allegations are deemed denied.

50. As to the allegations in paragraph 50 of the Complaint, Trigon states that the courts' opinions speak for themselves and denies the allegations to the extent they are inconsistent with the courts' opinions.

51. Trigon denies the allegations in paragraph 51 of the Complaint to the extent that they relate to Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 51 of the Complaint and, therefore, these allegations are deemed denied.

52. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 52 of the Complaint and, therefore, these allegations are deemed denied.

53. As to the allegations in paragraph 53 of the Complaint, Trigon states that Exhibits A, B and C, attached to the Complaint, speak for themselves and denies these allegations to the extent they are inconsistent with these Exhibits. Trigon is without knowledge or information

sufficient to form a belief as to the truth of the remaining allegations in paragraph 53 of the Complaint and, therefore, these allegations are deemed denied.

54. Trigon denies the allegations in paragraph 54 of the Complaint to the extent that they relate to Trigon. Trigon further states that the court's opinion speaks for itself and denies these allegations to the extent they are inconsistent with the court's opinion. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 54 of the Complaint and, therefore, these allegations are deemed denied.

55. Trigon denies the allegations in paragraph 55 of the Complaint.

56. Trigon denies the allegations in paragraph 56 of the Complaint. Trigon further states that Exhibit D, attached to the Complaint, speaks for itself and denies these allegations to the extent they are inconsistent with Exhibit D.

57. Upon information and belief, Trigon admits the allegations in paragraph 57 of the Complaint.

58. Upon information and belief, Trigon admits the allegations in paragraph 58 of the Complaint.

59. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59 of the Complaint and, therefore, these allegations are deemed denied.

60. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 60 of the Complaint and, therefore, these allegations are deemed denied.

61. Trigon denies the allegations in paragraph 61 of the Complaint.

62. Upon information and belief, Trigon admits the allegations in paragraph 62 of the Complaint.

63. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 63 of the Complaint because "system of healthcare plans" is not defined and the source of the quotation is not identified; therefore, these allegations are deemed denied.

64. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 64 of the Complaint as to whether the allegations are a matter of fundamental trademark law in the United States and, therefore, these allegations are deemed denied. Trigon denies the allegations in the second sentence of paragraph 64 of the Complaint. Trigon further states that, over time, it has entered into trademark license agreements with the Blue Cross and Blue Shield Association and acts in accordance with the terms and conditions of those agreements.

65. Trigon denies the allegations in the first sentence of paragraph 65 of the Complaint. Trigon denies the allegations in the second sentence of paragraph 65 of the Complaint that it has instituted any form of anti-chiropractic policy. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 65 of the Complaint and, therefore, these allegations are deemed denied.

66. Trigon incorporates its responses to paragraphs 1 through 65 above.

67. Trigon admits that the quoted statement in paragraph 67 of the Complaint has been made in Trigon publications but denies that it has any market power and further avers that there are larger managed health care companies which are conducting business within the Commonwealth of Virginia. Trigon further admits the allegations in paragraph 67 of the Complaint that Trigon Healthcare, Inc. wholly owns Trigon Insurance Company, Trigon Health and Life Insurance Company and other corporations that sell healthcare insurance and/or administer healthcare plans but denies that Trigon Healthcare, Inc. wholly owns Trigon Administrators.

68. Trigon admits the allegations in paragraph 68 of the Complaint that until 2000 it wholly owned Mid-South Insurance Company.

69. Trigon admits the allegations in paragraph 69 of the Complaint.

70. Trigon denies the allegations in paragraph 70 of the Complaint.

71. Trigon admits the allegations in paragraph 71 of the Complaint.

72. Trigon admits the allegations in paragraph 72 of the Complaint that the number of persons covered by PPO healthcare plans sold by Trigon increased 36% from June 30, 1999 to June 30, 2000, and denies the remaining allegation in paragraph 72 of the Complaint.

73. Trigon denies the allegations in paragraph 73 of the Complaint.

74. Trigon denies the allegations in paragraph 74 of the Complaint.

75. As to the allegations in paragraph 75 of the Complaint, Trigon admits that the Provider Policy Committee may review management proposals and may make recommendations to the Board of Directors but denies the remaining allegations in paragraph 75 of the Complaint.

76. Trigon admits the allegations in paragraph 76 of the Complaint that the Provider Policy Committee is a committee of the Board of Directors, that two of the members are not directors of Trigon and that Dr. Blanchard is a member of the PPC. Trigon denies the remaining allegations in pargraph 76 of the Complaint.

77. Trigon denies the allegations in paragraph 77 of the Complaint.

78. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 78 of the Complaint and, therefore, these allegations are deemed denied.

79. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 79 of the Complaint and, therefore, these allegations are deemed denied.

80. Trigon denies the allegations in paragraph 80 of the Complaint.

81. Trigon admits the allegations in paragraph 81 of the Complaint that it has licensed from Blue Cross and Blue Shield Association the exclusive right to use the Blue Cross/Blue Shield marks within the Commonwealth of Virginia other than a portion of Northern Virginia adjacent to Washington, D.C., but denies the remaining allegations in paragraph 81 of the Complaint.

82. Trigon admits the allegations in paragraph 82 of the Complaint that it sells healthcare plans under the Blue Cross/Blue Shield mark and that its use of the mark conforms to the license agreement between Trigon and the Blue Cross and Blue Shield Association, but denies the remaining allegations in paragraph 82 of the Complaint.

83. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 83 of the Complaint and, therefore, these allegations are deemed denied.

84. Trigon denies the allegations in paragraph 84 of the Complaint.

85. Trigon admits the allegations in paragraph 85 of the Complaint.

86. Trigon admits the allegations in paragraph 86 of the Complaint.

87. Trigon denies the allegations in paragraph 87 of the Complaint.

88. Trigon admits the allegations in paragraph 88 of the Complaint that its contracts with chiropractors are entitled Ancillary Professional Provider Agreements and that by signing the contract, chiropractors become part of Trigon's network or participating providers and denies the remaining allegations in paragraph 88 of the Complaint. Trigon further states that the Ancillary Professional Provider Agreements speak for themselves and denies these allegations to the extent they are inconsistent with the Ancillary Professional Provider Agreements.

89. Trigon admits the allegations in paragraph 89 of the Complaint that approximately 95% of physicians in the Commonwealth have entered into contracts with Trigon.

90. Trigon denies the allegations in paragraph 90 of the Complaint.

91. Trigon denies the allegations in paragraph 91 of the Complaint.

92. Trigon denies the allegations in paragraph 92 of the Complaint.

93. Trigon denies the allegations in paragraph 93 of the Complaint.

94. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 94 of the Complaint and, therefore, these allegations are deemed denied.

95. Trigon admits the allegations in paragraph 95 of the Complaint that the Commonwealth of Virginia does not require that chiropractic assistants obtain professional licensure. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining

allegations in paragraph 95 of the Complaint and, therefore, these allegations are deemed denied.

96. Trigon denies the allegations in paragraph 96 of the Complaint.

97. Trigon denies the allegations in paragraph 97 of the Complaint.

98. Trigon denies the allegations in paragraph 98 of the Complaint.

99. Trigon admits the allegations in paragraph 99 of the Complaint that it requires that providers submit requests for payment using CPT codes or alternative codes, such as HCPCS, designated by Trigon. Trigon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 99 of the Complaint and, therefore, these allegations are deemed denied.

100. Trigon admits the allegations in paragraph 100 of the Complaint that in 1997 the AMA adopted three CPT codes associated with treatments of different numbers of regions of the spine by chiropractors but denies the remaining allegations in paragraph 100 of the Complaint.

101. Trigon admits the allegations in paragraph 101 of the Complaint that the CPT codes correspond to manipulation of a number of regions of the spine but denies the remaining allegations in paragraph 101 of the Complaint.

102. Trigon admits the allegations in paragraph 102 of the Complaint that RBRVS is one resource used in the industry for determining reimbursement levels and denies the remaining allegations in paragraph 102 of the Complaint.

103. Trigon admits the allegations in paragraph 103 of the Complaint that the amounts that it reimburses providers for treatment are set by considering, among other things, Medicare's Resource Based Relative Value System. Trigon further states that it reimburses providers based on the amounts set forth in its provider agreements and denies the remaining allegations in paragraph 103 of the Complaint.

104. Trigon admits the allegations in the first sentence of paragraph 104 of the Complaint. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 104 of the Complaint and, therefore, these allegations are deemed denied.

105. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 105 of the Complaint and, therefore, these allegations are deemed denied.

106. Trigon denies the allegations in paragraph 106 of the Complaint.

107. Trigon denies the allegations in paragraph 107 of the Complaint.

108. Trigon denies the allegations in paragraph 108 of the Complaint.

109. Trigon denies the allegations in paragraph 109 of the Complaint.

110. Trigon denies the allegations in paragraph 110 of the Complaint.

111. Trigon denies the allegations in paragraph 111 of the Complaint.

112. Trigon denies the allegations in paragraph 112 of the Complaint.

113. Trigon denies the allegations in paragraph 113 of the Complaint.

114. Trigon denies the allegations in paragraph 114 of the Complaint.

115. Trigon denies the allegations in paragraph 115 of the Complaint.

116. Trigon denies the allegations in paragraph 116 of the Complaint.

117. Trigon denies the allegations in paragraph 117 of the Complaint.

118. Trigon denies the allegations in paragraph 118 of the Complaint.

119. Trigon admits the allegations in paragraph 119 of the Complaint that there is a $500 coverage limit for spinal manipulations and other manual medical interventions in many of its health care policies issued to employers or groups, but denies the remaining allegations in paragraph 119.

120. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 120 of the Complaint and, therefore, these allegations are deemed denied.

121. As to the allegations in paragraph 121 of the Complaint, Trigon states that the court's opinion speaks for itself and denies the allegations to the extent they are inconsistent with the court's opinion. Trigon denies the remaining allegations in paragraph 121 of the Complaint.

122. Trigon denies the allegations in paragraph 122 of the Complaint.

123. Trigon denies the allegations in paragraph 123 of the Complaint.

124. Trigon denies the allegations in paragraph 124 of the Complaint.

125. Trigon denies the allegations in paragraph 125 of the Complaint.

126. Trigon denies the allegations in paragraph 126 of the Complaint.

127. Trigon denies the allegations in paragraph 127 of the Complaint.

128. Trigon denies the allegations in paragraph 128 of the Complaint.

129. Trigon denies the allegations in paragraph 129 of the Complaint.

130. Trigon denies the allegations in paragraph 130 of the Complaint.

131. Trigon denies the allegations in paragraph 131 of the Complaint.

132. Trigon denies the allegations in paragraph 132 of the Complaint.

133. Trigon denies the allegations in paragraph 133 of the Complaint.

134. Trigon incorporates its responses to paragraphs 1 through 133 above.

135. Trigon denies the allegations in paragraph 135 of the Complaint.

136. Trigon incorporates its responses to paragraphs 1 through 135 above.

137. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 137 of the Complaint.

138. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 138 of the Complaint.

139. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 139 of the Complaint.

140. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 140 of the Complaint.

141. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 141 of the Complaint.

142. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 142 of the Complaint and, therefore, these allegations are deemed denied.

143. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 143 of the Complaint.

144. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 144 of the Complaint.

145. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 145 of the Complaint.

146. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 146 of the Complaint except to admit that some chiropractors have in the past requested additional reimbursement for treatment of three or more regions of the spine.

147. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 147 of the Complaint except to admit that some chiropractors have in the past requested additional reimbursement for treatment of three or more regions of the spine.

148. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 148 of the Complaint.

149. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 149 of the Complaint.

150. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 150 of the Complaint.

151. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 151 of the Complaint, except to admit that certain healthcare services are covered by Trigon's healthcare plans.

152. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 152 of the Complaint.

153. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 153 of the Complaint.

154. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 154 of the Complaint.

155. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 155 of the Complaint.

156. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 156 of the Complaint.

157. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 157 of the Complaint.

158. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 158 of the Complaint,

159. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 159 of the Complaint.

160. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 160 of the Complaint.

161. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 161 of the Complaint.

162. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 162 of the Complaint.

163. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 163 of the Complaint.

164. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 164 of the Complaint.

165. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 165 of the Complaint.

166. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 166 of the Complaint.

167. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 167 of the Complaint.

168. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 168 of the Complaint.

169. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 169 of the Complaint.

170. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 170 of the Complaint.

171. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 171 of the Complaint.

172. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 172 of the Complaint.

173. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 173 of the Complaint.

174. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 174 of the Complaint.

175. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 175 of the Complaint.

176. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 176 of the Complaint.

177. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 177 of the Complaint.

178. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 178 of the Complaint.

179. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 179 of the Complaint.

180. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 180 of the Complaint.

181. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 181 of the Complaint.

182. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 182 of the Complaint.

183. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 183 of the Complaint.

184. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 184 of the Complaint.

185. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 185 of the Complaint.

186. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 186 of the Complaint.

187. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the RICO Act, Trigon denies the allegations in paragraph 187 of the Complaint.

188. Trigon incorporates its responses to paragraphs 1 through 187 above.

189. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 189 of the Complaint and, therefore, these allegations are deemed denied.

190. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 190 of the Complaint and, therefore, these allegations are deemed denied.

191. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 191 of the Complaint and, therefore, these allegations are deemed denied.

192. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 192 of the Complaint and, therefore, these allegations are deemed denied.

193. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 193 of the Complaint and, therefore, these allegations are deemed denied.

194. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 194 of the Complaint and, therefore, these allegations are deemed denied.

195. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 195 of the Complaint and, therefore, these allegations are deemed denied.

196. Trigon is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 196 of the Complaint and, therefore, these allegations are deemed denied.

197. Trigon denies the allegations in paragraph 197 of the Complaint.

198. Trigon denies the allegations in paragraph 198 of the Complaint.

199. Trigon denies the allegations in paragraph 199 of the Complaint.

200. Trigon denies the allegations in paragraph 200 of the Complaint.

201. Trigon denies the allegations in paragraph 201 of the Complaint.

202. Trigon denies the allegations in paragraph 202 of the Complaint.

203. Trigon denies the allegations in paragraph 203 of the Complaint.

204. Trigon incorporates its responses to paragraphs 1 through 203 above.

205. Trigon denies the allegations in paragraph 205 of the Complaint.

206. Trigon denies the allegations in paragraph 206 of the Complaint.

207. Trigon denies the allegations in paragraph 207 of the Complaint.

208. Trigon denies the allegations in paragraph 208 of the Complaint.

209. Trigon incorporates its responses to paragraphs 1 through 208 above.

210. As to the allegations in paragraph 210 of the Complaint, Trigon states that the contracts speak for themselves and admits that it has entered into contracts with doctors of chiropractic, but denies the remaining allegations in paragraph 210 of the Complaint.

211. Trigon admits the allegations in paragraph 211 of the Complaint.

212. As to the allegations contained paragraph 212 of the Complaint, Trigon states that the contracts speak for themselves and denies the allegations to the extent they are inconsistent with the contracts.

213. Trigon denies the allegations in paragraph 213 of the Complaint except to admit that the contracts obligate the doctors of chiropractic to accept as payment in full the amounts agreed to by the doctors of chiropractic and Trigon.

214. Trigon denies the allegations in paragraph 214 of the Complaint.

215. As to the allegations contained in paragraph 215 of the Complaint, Trigon states that the contracts speak for themselves and denies the allegations to the extent they are inconsistent with the contracts. Trigon denies the remaining allegations in paragraph 215 of the Complaint.

216. Trigon denies the allegations in paragraph 216 of the Complaint.

217. Trigon denies the allegations in paragraph 217 of the Complaint.

218. Trigon incorporates its responses to paragraphs 1 through 217 above.

219. Trigon denies the allegations in paragraph 219 of the Complaint.

220. Trigon denies the allegations in paragraph 220 of the Complaint.

221. Trigon denies the allegations in paragraph 221 of the Complaint.

222. Trigon incorporates its responses to paragraphs 1 through 221 above.

223. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the insurance laws of the Commonwealth of Virginia, Trigon denies the allegations in paragraph 223 of the Complaint.

224. Trigon states that while no response should be required based on the Court's dismissal of Plaintiffs' cause of action for alleged violations of the insurance laws of the Commonwealth of Virginia, Trigon denies the allegations in paragraph 224 of the Complaint.

225. Trigon admits that Plaintiffs have demanded a trial by jury the allegations in paragraph 225 of the Complaint, but denies that there are any jury issues in this action.

226. Trigon denies that Plaintiffs are entitled to any of the relief set forth in the WHEREFORE clause, including all of the subparagraphs set forth therein, of the Complaint.

227. All allegations not specifically admitted herein are denied.

Affirmative Defenses

Without assuming the burden of proof on any defenses that would otherwise rest with Plaintiffs, and expressly denying any and all wrongdoing, Trigon alleges the following additional reasons why Plaintiffs are not entitled to pursue their claims or to recover anything from Trigon. In addition to the Affirmative Defenses set forth below, Trigon intends to rely on all other properly provable defenses and reserves the right to amend its Answer to and through the time of trial.

FIRST AFFIRMATIVE DEFENSE

As and for a first separate, distinct and affirmative defense, Trigon alleges that the Complaint fails to state a claim or claims upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

As and for a second separate, distinct and affirmative defense, Trigon alleges that this action may be barred, in whole or in part, by the applicable statutes of limitations.

THIRD AFFIRMATIVE DEFENSE

As and for a third separate, distinct and affirmative defense, Trigon alleges that this action may be barred, in whole or in part, by the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

As and for a fourth separate, distinct and affirmative defense, Trigon alleges that this action may be barred, in whole or in part, by the doctrines of estoppel and *res judicata*.

FIFTH AFFIRMATIVE DEFENSE

As and for a fifth separate, distinct and affirmative defense, Trigon alleges that this action may be barred, in whole or in part, to the extent Plaintiffs seek improper, excessive and unreasonable multiple and punitive awards for a single wrong. Such awards would violate Trigon's fights under the United States Constitution and the Virginia Constitution, specifically the Due Process Clause of the Fifth Amendment and Fourteenth Amendments to the United States Constitution; the Sixth Amendment to the United States Constitution; the Eighth Amendment to the United States Constitution; and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

SIXTH AFFIRMATIVE DEFENSE

As and for a sixth separate, distinct and affirmative defense, Trigon alleges that this action may be barred, in whole or in part, because any conduct or action of Trigon was and is reasonable and lawful based on independent, legitimate business and economic justifications.

SEVENTH AFFIRMATIVE DEFENSE

As and for a seventh separate, distinct and affirmative defense, Trigon alleges that this action may be barred because Trigon has engaged in no conduct in combination with any other persons and has always acted unilaterally and independently.

EIGHTH AFFIRMATIVE DEFENSE

As and for an eighth separate, distinct and affirmative defense, Trigon alleges that this action may be barred, in whole or in part, because Trigon has engaged in no activity or conduct that is a proximate cause of any injury alleged by Plaintiffs.

NINTH AFFIRMATIVE DEFENSE

As and for a ninth separate, distinct and affirmative defense, Trigon alleges that this action may be barred by the intracorporate immunity doctrine.

TENTH AFFIRMATIVE DEFENSE

As and for a tenth separate, distinct and affirmative defense, Trigon alleges that this action may be barred, in whole or in part, because some or all Plaintiffs' lack standing, including antitrust standing, to bring or maintain this action.

ELEVENTH AFFIRMATIVE DEFENSE

As and for an eleventh separate, distinct and affirmative defense, Trigon alleges that some of Plaintiffs claims are preempted by § 514 of the Employee Retirement Income Security Act, 29 U.S.C §§ 1001 *et seq.*

WHEREFORE, Defendants move this Court for an order dismissing Plaintiffs' action against them and awarding them costs expended herein and such other, further and additional relief as may be warranted.

Dated: January 17, 2002

Respectfully submitted,

Trigon Healthcare, Inc., Trigon Insurance Co.,
Trigon Administrators, Inc.,
Mid-South Insurance Company and
Trigon Health and Life Insurance Company

By /s/_____

R. Gordon Smith (VSB #5925)
Howard Feller (VSB #18248)
Bryan A. Fratkin (VSB #38933)
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000 (phone)
(804) 775-1061 (fax)

Richard E. Ladd, Jr. (VSB #30409)
Penn, Stuart & Eskridge
Post Office Box 2009
Bristol, Virginia 24201
540-466-4800 (phone)
540-466-8672 (fax)

Certificate of Service

I hereby certify that on this 17th day of January, 2002, a true copy of the foregoing was sent via Federal Express, to:

George P. McAndrews, Esquire
Steven J. Hampton, Esquire
Peter J. McAndrews, Esquire
McAndrews, Held & Malloy, Ltd.
500 West Madison Street, 34th Floor
Chicago, Illinois 60661
(312) 775-8000

Thomas R. Daly, Esquire
(VSB # 19942)
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031
(703) 218-2110

William G. Shields, Esquire
(VSB # 14200)
William G. Shields & Associates
601 North Courthouse Rd., Suite 1
Richmond, Virginia 23236
(804) 897-4497

Counsel for Plaintiffs

/s/_____

R-4025/1 -COR/FOER

The Appropriateness of Spinal Manipulation for Low-Back Pain

Project Overview and Literature Review

Paul G. Shekelle, Alan H. Adams, Mark R. Chassin, Eric L. Hurwitz, Reed B. Phillips, Robert H. Brook

Supported by the
Consortium for Chiropractic Research
Foundation for Chiropractic Education and Research

PREFACE

This report presents results from one part of the RAND Appropriateness of Spinal Manipulation for Low-Back-Pain Study. The study is designed to ascertain the clinical criteria *for* the appropriate use of spinal manipulation for low-back pain from chiropractors and medical specialists and then to investigate the use of chiropractic services (particularly spinal manipulation) in a random sample of practicing chiropractors. The study has four major stages:

- Stage I reviewed the medical literature to summarize knowledge about efficacy, complications, and indications for spinal manipulation for low-back pain.

- Stage II convened a panel of back-pain experts from the disciplines of orthopedics, chiropractic, osteopathy, internal medicine, family medicine, and neurology~ to discuss and rate for appropriateness a large number of

indications for spinal manipulation for low-back pain.

- Stage III will convene a second, all-chiropractic panel of experts, to discuss and rate the same indications for spinal manipulation for low-back pain.

- Stage IV will analyze the use of services in a random sample of practicing chiropractors, with an emphasis on abstraction of medical records for patients treated for low-back pain.

This report presents the results of the first stage. It describes what is known in the medical literature about the utilization, efficacy, complications, and indications for spinal manipulation for low-back pain. It should be of interest to clinicians who perform spinal manipulation, clinicians who deal with patients with back pain, and to health researchers concerned with the appropriate indications for performing medical procedures.

This research is a joint undertaking of RAND; the UCLA Division of General Internal Medicine, Department of Medicine; the Consortium for Chiropractic Research (car); the Foundation for chiropractic Education and Research (FCER); and Value Health Sciences, Inc. Support has been provided by the CCR and the FCER.

SUMMARY

This report contains a literature review of spinal manipulation for low-back pain.

Spinal manipulation is a manual procedure that involves a directed thrust to move a joint ~ the physiologic range of motion without exceeding the anatomic range of motion. Spinal manipulation has been used for centuries as a treatment for musculoskeletal complaints. In recent times, the use of spinal manipulation has been equated with the practice of chiropractic~-. , in part because of this, spinal manipulation has been labeled n "unorthodox" treatment by the medical profession. This review covers the literature from 1955 to the present on the use of spinal manipulation. It gathers data from 76 sources including 22 controlled trial of the use of spinal manipulation for low-back pain.

UTILIZATION

Based on limited data, it is estimated that about 5% of the U.S. population annually uses chiropractors. The majority of patients seek care for back pain and related complaints and are usually treated with spinal manipulation. The course of treatment generally involves multiple visits and manipulations, between 5 and 18 per episode. This care is delivered by about 45,000 chiropractors at a cost of approximately $2.4 billion annually. In one study, chiropractors delivered upwards of 90% of the manipulative therapy for which reimbursement was sought. Chiropractic patients are more likely to be white, middle-aged, and employed than the general population.

COMPLICATIONS

There is no systematic report on the frequency of complications. Collections of anecdotal reports suggest that the serious complications of spinal manipulation include death, paraplegia, and advancement of unrecognized coexisting medical disorders because of misdiagnosis. The rate of these occurrences is probably low, but the lack of data in the literature prevents firm conclusions.

EFFICACY

The literature on the efficacy of spinal manipulation is of uneven quality. While many studies are randomized controlled trials, there is a great diversity in the initial selection and evaluation of patients for study, assignment of those patients to spinal manipulation or a control treatment, the type of spinal manipulation given, the type of control treatment given, and the method of assessing a response. Given that caveat, support is consistent for the use of spinal manipulation as a treatment for patients with acute low-back pain and an absence of other signs or symptoms of lower limb nerve-root involvement. Support is less clear for other indications, with the evidence for some insufficient (acute and subacute low-back pain with sciatica, acute and subacute low-back pain with minor lower limb neurologic findings, most types of chronic back pain), while the evidence for others is conflicting (acute low-back pain with sciatica and minor lower limb neurological findings, subacute low-back pain without sciatica, and chronic low-back pain without sciatica).

CONTENTS

PREFACE iii

SUMMARY v

ACKNOWLEDGMENTS vii

TABLES xi

Section

1. PROJECT OVERVIEW 1

2. LITERATURE REVIEW 3

Utilization 3

Complications 4

Efficacy 5

Acute Low-Back Pain 6

Subacute Low-Back Pain 9

Chronic Low-Back Pain 11

Other Concerns 13

Appendix:
CONTROLLED TRIALS OF SPINAL MANIPULATION ... 17

REFERENCES 23

TABLES

1. Classification of research articles on manipulation for back pain 4

2. Ohio State Chiropractic Association guidelines for frequency and duration of treatment 14

3. La Brat's guidelines for frequency and duration of treatment 14

1. PROJECT OVERVIEW

The appropriateness with which health services are used has been gaining increasing attention over the last decade. As health care costs continue to climb and as evidence mounts that some medical and surgical procedures are overused, there is a growing perception that the United States is not receiving sufficient value for its expenditures

on health. The demonstration of large geographic variations in the use rate of medical care, beyond those explained by underlying differences in the populations at risk, has led some to question whether physicians agree on the type and amount of medical care that is appropriate for certain conditions. Considerable research has indicated uncertainty even among nationally recognized experts in the conditions under question. This underlying uncertainty about how to treat certain diseases may be in part responsible for overuse and for the needless expenditure and risk such inappropriate use places upon payors and patients.

Back pain occurs in up to 80% of adults at some point in their lives (Deyo, 1983) and is one of the leading causes of visits to physicians (Deyo, 1983; Deyo, 1987). Except in rare presentations, it is appropriate for most persons with back pain to undergo an initial course of conservative therapy (Deyo, 1983). These conservative measures have included oral medications, injectable drugs, counter-stimulation (such as transcutaneous electrical nerve stimulation. and physical measures (such as bedrest, corsets, exercises, and manipulation). Manipulation is among the most controversial of these measures. Although practiced for centuries, no evidence to date conclusively proves the effectiveness or lack thereof for the use of spinal manipulation to treat back pain. This, combined with the association of spinal manipulation with the practice of chiropractic, has relegated the use of spinal manipulation to the unorthodox' category of treatments among the medical (allopathic) profession.

Spinal manipulation, however, is the most commonly used conservative treatment for low back pain for which reimbursement is sought. About two-thirds of all patient visits for back pain are made to chiropractors (Murt, 1986). Most of these patients are treated with spinal manipulation. This care cost approximately $2.4 billion in

19~8 *(FACTS Bulletin),* while the total cost of direct medical care for back pain in the United States is estimated at $8 billion annually (Bonica, 1982).

For all of these reasons—the prevalence of back pain in America, its cost to society, and the uncertainty about the role spinal manipulation should play in its treatment—RAND; the UCLA Division of General Internal Medicine, Department of Medicine; the Consortium for Chiropractic Research (CCR); the Foundation for Chiropractic Education and Research FCER); and Value Health Sciences, Inc. (VHS), have undertaken an examination of the appropriate use of spinal manipulation in the treatment of low-back pain. Support has been provided by the National Institutes of Health, the CCR, and the FCER.

This project will result in a comprehensive set of indications for performing spinal manipulation for persons with low-back pain and will have two sets of appropriateness ratings of these indications: one by a multidisciplinary panel of experts, representing the disciplines of orthopedics osteopathy, chiropractic, internal medicine, neurology, and family practice, and the second by an all-chiropractic panel. From these ratings, we will develop a medical record abstraction form, a utilization form, and a patient survey. These research instruments will then be used on a random sample of low-back pain patients of chiropractors from a specified geographic area to answer the following research questions:

- What is the use of chiropractic services in the specified geographic area?

- With regard to the chiropractic spinal manipulative therapy of low-back pain what is the level of appropriate care being delivered?

- Does the level of appropriate care vary significantly with the provider? Are there variables predictive of the delivery of appropriate care?

- What are the demographic and general health characteristics of chiropractic patients, and do these differ from patients in the outpatient general medical setting

RAND publications from this project will consist of the following:

1. This volume, which contains the project overview and literature

2. The ratings of appropriateness by the multidisciplinary panel

3. The ratings of appropriateness by the all-chiropractic panel

4. The analysis of the two sets of ratings

5. The research instruments

6. The results of the one-site field study of the use of chiropractic services, the used spinal manipulation, and the chiropractic patients' characteristics.

2. LITERATURE REVIEW

Spinal manipulation as a treatment for musculoskeletal complaints has been practiced centuries, having been described by Hippocrates, Galen, and other Western physicians, as in the writings of comparable

historical figures in Eastern medical history. Many physicians of the 19th century practiced spinal manipulation, and late in that century the two principal philosophies concerning spinal manipulation were developed. Andrew Sull proposed the concept of osteopathy in 1874, and D.D. Palmer formulated the spinal subluxation in 1895. Since then, spinal manipulation has fallen out of favor with physicians and has become virtually the exclusive domain of chiropractors. A analysis of a community-based sample of patients showed that chiropractors delivered of all the manipulative care for which reimbursement was sought, with osteopaths soaring 4% and general practitioners and orthopedic surgeons accounting for the remainder. Recently, however, there seems to be a renewed interest in manipulation on the part of the medical profession (Meade, 1990).

Manipulation encompasses many different techniques. The two most commonly used methods are nonspecific long-lever manipulations and specific short-lever, high-velocity spinal adjustments. It is this second method which is most closely identified with chiropractic practice, although many chiropractors use the long-lever manipulations as well.

This literature review will examine the use of manipulation, of all types, in the treatment of low-back pain. The review initially searched the Index Medicus and computerized database of MEDLINE from 1955 to the present for relevant articles using the Medical Heading terms *chiropractic, manipulation,* and *backache.* It then drew on the bibliography of these articles, as well as a bibliography developed by the CCR. An orthopedist and two chiropractors evaluated the bibliography for completeness and suggested additional sentences including textbooks. No unpublished material was included.

Articles were selected for inclusion if they contained data on the complications, efficacy, use of manipulation for the treatment of low-back pain. Priority was given to research that used a randomized, controlled trial design. Second priority was given to case-series and published in peer-reviewed journals, as well as textbooks. Case reports were excluded except to document complications.

This review is the result of an analysis of 67 articles and 9 books or textbooks published between 1955 and 1989. The table below presents the lumber of studies or articles reviewed, classified by type of research design or source.

This review was prepared to assist back-pain experts in the assessment of the appropriate clinical circumstances for performing spinal manipulation. As such, it summarizes efficacy clinical categories that were used by these experts during the assessment process.

UTILIZATION

Utilization studies of the chiropractic manipulative treatment of low-back pain are few. Most are either regional, lack adequate sampling schemes, or have possibly outdated

Table I

CLASSIFICATION OF RESEARCH ARTICLES ON MANIPULATION FOR BACK PAIN

Category	Number	Percent
Research studies	34	45
Controlled trials	(22)	–
Case-series	(12)	–
Case reports	4	5
Reviews	22	29

Miscellaneous	7	9
Books/textbooks	9	12
Total	76	100

databases that do not allow generalization with confidence to the 1990s. Still, some statements can be made.

The rate of use of chiropractic services is approximately 50 visits per 100 person-year~ used by about 5% of the population (Von Kuster, 1980; Mugge, 1986; Shekelle, 18911. This care is delivered by about 45,000 chiropractors at a cost of approximately $2.4 billion in 1%~ *(FACTS Bulletin,* 1989). Between 32 and 45% of these visits are for low-back pain (Phillip~. 1982; Nyiendo, 1987; Pima Health Systems, 1975; Shekelle, 1991). The patients average - between 5 and 18 visits per episode (Nyiendo, 1987; Phillips, 1982; Shekelle, 1991; Von Kuster, 1980). This type of care is most frequently used by persons who are white, middle - aged, employed, and high-school educated (New Haven Health Care, Inc., 1976; Mugge, 1986, Nyiendo, 1987; Shekelle, 1991). Seven-fold differences in the use rate of chiropractic services have been seen, but the cause or causes of these variations in use remain unknown (Shekelle, 1991).

In one study, chiropractors delivered over 90% of the manipulations for which reimbursement was sought (Shekelle, 1991).

COMPLICATIONS

There has been no systematic study of the frequency of complications from spinal manipulative therapy. A literature review by Ladermann (1980) showed 135 case reports of serious complications, including 18 deaths, from manipulation. These case reports are primarily from the period 1950 to 1980. The number of manipulations received during this 30-year period is unknown, but must number in the tens of millions.

The majority of complications of manipulation can be attributed to the following:

- Misdiagnosis
- Presence of coagulation dyscrasias
- Cervical manipulation
- Presence of herniated nucleus pulposus
- Improper technique.

Misdiagnosis of the patient's condition accounted for 26 of the 135 cases in the report of Ladermann. Most of these involved the unrecognized presence of tumors or metastases. The main complication was delay in diagnosis and treatment. The most serious complication of coagulation dyscrasias was paraplegia from meningeal hematoma. Cervical manipulation had a greater number of complications, of a more serious nature, than did lumbar manipulation. This literature review will not deal with cervical manipulation. The development of the cauda equina syndrome was reported in 20 patients with the presenting symptom of sciatica treated with lumbar manipulation. Many of these patients were manipulated under narcosis or ether anesthesia, which is not acceptable chiropractic technique today. Improper techniques, hale important, is not the subject of this review, nor the focus of the panel discussion

These data suggest that the risk of spinal manipulation is small and that it may vary within subgroups of patients based on their clinical presentation. No firm conclusions may be drawn, however, as there is little available data in the literature.

EFFICACY

The efficacy of spinal manipulation for low-back pain must be assessed by the degree of benefit compared to risk it confers on patients upon whom it is performed. As no survival benefit has ever been shown or claimed, this assessment is necessarily based on subjective or objective evaluations of relief of pain, time to relief of pain, improvement in functional status days lost from work, reduced anxiety, and the like. Additionally, certain physiologic variables, such as flexibility and number of degrees of straight leg raising, have been measured, but in general there is a poor correlation between these measures and functional status.

Ideally, the efficacy of spinal manipulation for the treatment of low-back pain would be assessed by performing a series of randomized, controlled clinical trials upon patients with a variety of different clinical presentations. The patients would need to be selected with an appreciation of the clinical variables predictive of a beneficial result from manipulation. The nonmanipulated group would need to receive some sham treatment to control for the powerful placebo affect of "the laying on of hands." The manipulation itself would be done by an expert clinician and would be defined in terms such that others could reproduce the technique. The assessment of outcome would be performed by observers blinded to the treatment type. The sample size would be large enough to have sufficient power to detect a clinically significant effect should it exist. If a benefit for manipulation was shown,

then manipulation could be compared to other therapies for low-back pain, including bedrest, "back school," corset, and TENS, in another series of randomized trials. Such a research agenda would take many trials, involving many patients, over a considerable period of time. For these reasons and others, the definitive trials of manipulative therapy have yet to be done, as many have noted Brunarski, 1984; Curtis, 1988; Greenland, 1980; Evans, 1985; Hoehler, 1987; Deyo, 1983). Because of the cost and technical difficulties, such a series of trials is unlikely to be completed in the near future. Therefore, as stated by Curtis, the efficacy of spinal manipulation is neither scientifically proven nor disproven at this time.

This review will deal with what is known about the efficacy of spinal manipulation for patients with the following specific clinical problems:

Acute low-back pain
- without neurological findings
- with minor neurological findings
- with major neurological findings
- with sciatic nerve root irritation

Subacute low-back pain
- without neurological findings
- with minor neurological findings
- with major neurological findings
- with sciatic nerve root irritation

Chronic low-back pain
- without neurological findings
- with minor neurological findings
- with major neurological findings
- with sciatic nerve root irritation
- with prior laminectomy.

In addition, this review will deal with some other issues of importance concerning spinal manipulation, including contraindications and treatment intensity and duration.

Before discussing specific clinical syndromes, it is important to mention the limitations, of a general nature, with the controlled trials of manipulation. The initial selection and evaluation of patients for study has varied greatly. Some studies have included all patients presenting to a certain clinic, regardless of duration of pain, mechanism of onset, age, physical exam, etc. Others have carefully restricted patients to those with pain of uniform onset those who have specific findings on physical examination, or other factors. The technique of manipulation is often unclear in many studies and has been performed by a variety of health personnel, including physicians, chiropractors, physiotherapists, and osteopaths. The control groups have varied widely, some receiving virtually no therapy, most receiving a variety of nonspecific measures, such as short-wave diathermy, and a few receiving sophisticated sham manipulations. How these control groups dealt with the placebo effect differed. Outcome measures were not always assessed by an observer blinded to treatment type, introducing bias. In addition, outcome measures have varied between objective measurements (which are of uncertain clinical significance) to subjective measures ranging from simply asking the patient if he feels better to reliable and valid questionnaires dealing with back pain. Lastly, other problems were of sample size, Type II error, and appropriate statistical analysis. Many studies have so few subjects that no conclusion can be drawn. Outcomes measured on ordinal scales have been analyzed with a chi-square test for distribution rather than a test for trend, detracting from statistical power. The Appendix at the end of this literature review summarizes the salient features of the controlled trials of manipulation for back pain.

For the purposes of this review, acute low-back pain is defined as pain of less than 3 weeks duration; subacute low-back pain is that of 3 to 13 weeks duration; and chronic low-back pain is pain of greater than 13 weeks. Sciatic nerve root irritation is defined as typical radicular pain, meaning shooting pain in the posterior thigh or calf, and a straight leg raising sign in the leg with the pain. Minor neurological findings are defined as at least one of the following an asymmetrically decreased ankle reflex, a lower limb dermatomal sensory deficit, or a nonprogressive lower limb muscle weakness. Major neurological findings are a progressive, unilateral lower limb muscle weakness or symptoms or signs of the cauda equina syndrome.

ACUTE LOW-BACK PAIN

Without neurological findings or sciatic nerve root irritation. Two controlled trials included only patients with acute low-back pain without neurological findings or sciatic nerve root irritation (Coyer, 1955; Rasmussen, 1979). Both showed a short-term benefit for manipulation compared to controls of bedrest or diathermy, in terms of time to pain relief. In the study by Coyer, there was a steadily decreasing advantage for the manipulated group at 3 and 6 weeks. Rasmussen's study is limited by its 2-week follow-up and its nonblinded assessment of results. An additional controlled trial by Doran (1975), which excluded patients with neurological findings or sciatic nerve root irritation but included patients with acute, subacute, and chronic pain, did not show any benefit for manipulation when compared to three control groups of physiotherapy, a corset, or bedrest. Hoeh.ler (1987) reanalyzed these data using a test for trend (rather than the statistically weaker chi-square test for distribution and showed a benefit of manipulation for improvement of pain at 3 weeks.

The study by Bergquist (1977) included patients with both acute and subacute low-back pain; however, 83% of patients had pain of less than 3 weeks duration. Patients with neurological findings were excluded. Sciatica was not excluded, though only 27% had sciatic nerve root irritation. Bergquist found no difference between "combined physiotherapy," which included manipulation to hypomobile joints and "back school," but both were significantly better than "placebo" in shortening the time to total recovery. No difference was found between groups in the rate of development of chronic pain, or the rate of recurrences of back pain within 1 year.

In other studies, Maitland (1957) reported his noncontrolled case series of 220 patients. Patients with acute low-back pain, without neurological findings, constituted 51% of the total. Twenty patients were treated with bedrest, yielding a 50% response rate requiring an average of 23 days treatment. His next 75 patients, plus six "failures" from the bedrest group, were treated with manipulation, yielding a 96% response rate in an average of 4.5 treatments. Potter (1977) reported a response rate or 93% for patients with acute low-back pain and no leg pain or neurological findings (N115; average number of treatments = 3.3) in his large case series.

In summary, the literature supports the use of spinal manipulation or bedrest for patients with acute low-back pain without evidence of neurological involvement or sciatic nerve irritation, with spinal manipulation possibly conferring a short-term but significant benefit in pain relief.

Without minor neurological findings but with sciatic nerve root irritation. One study restricted its patients to those with acute back pain without minor neurological findings, but did include those with sciatic leg pain, and presumably sciatic nerve root irritation as well

(Farrell, 1982). In this study, there was a short-term benefit for the manipulated group compared to a control group that received diathermy, exercises, and instruction; the difference was gone by 3 weeks.

Mathews (1987) included both patients with acute and subacute pain; otherwise, the sample patients were without minor neurological findings, but some did have sciatic nerve root irritation. There was an impressive short-term benefit for those patients with straight leg raising signs at 2 weeks. Follow-up at 1 year showed no difference between the manipulated group and the comparison group, which received infrared heat.

In the trial by Bergquist (1977), 83% of patients had acute pain and 27% of patients had sciatic nerve root irritation. "Back school" or "combined physiotherapy" (which included manipulation). were significantly better treatments than was diathermy (15.8, 14.8, and 28.7 days to recovery, respectively). This study is discussed in more detail in the section above entitled 'Without Neurological Findings or Sciatic Nerve Root Irritation."

In summary, the literature is insufficient to support or refute the use of spinal manipulation for patients with acute low-back pain and sciatic nerve root irritation. The limited data available suggest that for this class of patients, like those with acute low-back pain but without sciatic nerve root irritation, spinal manipulation may offer a short term benefit in terms of pain relief.

With minor neurological findings and without sciatic nerve root irritation. No study confined its patient population to only those with acute low-back pain with minor neurological findings without sciatic nerve root irritation. Meade's two studies (1986, 1990), which had patients with acute, subacute, and chronic back pain,

included those with minor neurologic findings and excluded those with sciatic nerve root irritation (but not leg pain alone). Both studies showed a statistically significant benefit for "chiropractic care" (which. almost always included manipulation) vs. "medical care" (which may have included nonchiropractic manipulation as well) in terms of the Oswestry Score, a reliable and valid instrument to assess functional status. The later study showed the benefit to be both durable (up to 2 years follow up) and equivalent for patients with acute (pain less than 1 month), subacute, and chronic (pain greater than 1 month) back pain.

In summary, the literature is insufficient to support or refute the use of spinal manipulation for patients, with acute low-back pain and minor neurological findings without sciatic nerve root irritation.

With minor neurological findings and sciatic nerve root irritation. There is one controlled trial of manipulation for patients with acute low-back pain and minor neurological findings who also all presumably had sciatic nerve root irritation (Nwuga, 1981). ~These patients also had disc protrusion confirmed by myelography. There was a significantly 'shorter time to pain relief in the manipulated group vs. a control group, which received diathermy. There was improvement in some, but not all, measured physiologic variables as well. Another study (Hadler, 1987) included patients with generally acute pain (but by our definition included some patients with subacute pain) and patients with signs of sciatica and presumably sciatic nerve root irritation. Overall, no benefit was shown for manipulation vs. mobilization; however, stratified analysis showed a benefit for manipulation in patients with symptoms of between 2 and 4 weeks. In other studies, Maitland (1957) reported a response rate of only 16% to 19% in patients with acute low-back pain and pain radiating down the leg. In contrast, Potter (1977) reported

improvement in 48% of his patients with acute low-back pain and neurological findings.

In summary, there is conflicting evidence in the literature on the use of spinal manipulation for patients with low-back pain with minor neurological findings and sciatic nerve root irritation.

With major neurological findings. There has been no study, controlled or uncontrolled, describing the manipulative treatment of patients with acute low-back pain and major neurological findings.

Additional issues. Vertebral joint fixation, sacroiliac joint fixation, and hypertonic contraction of the paraspinous muscles correspond to the syndromes described by KirkaldyWillis and Cassidy (1988) as "Definite and Certain Indications for Manipulation." No controlled trials support this statement. Kirkaldy-Willis and Cassidy report their case series of patients with mainly chronic pain; 80% to 90% of the patients with vertebral or sacroiliac joint fixation responded favorably. Numerous anecdotal reports by Maigne and others document the nearly instantaneous relief of pain due to the third indication (hypertonic contraction of the paraspinous muscles). Chiropractic teaching states that the presence of hypertonic contraction of the paraspinous muscles implies joint fixation.

Spinal manipulation has not been shown to reduce a herniated nucleus pulposus physically. In fact, two studies (Wilson, 1952; Chrisman, 1964) showed that there was no difference myelographically in disc protrusion before and after manipulation. Many patients reported an improvement in symptoms despite the apparent absence of a change in their disc protrusion. In the Chrisman study, the majority of patients who had chronic pain had an "excellent" or "good" improvement in pain relief *(35139);* however 10 of these ultimately had recurrences requiring operations.

The Quebec Task Force, which dealt with the usefulness of a variety of conservative modalities as treatments for low-back pain, classified "mobilisation/manipulation" as contraindicated on the basis of scientific evidence" for lumbar spinal disorders with radicular compression presumed or confirmed. They cite no references to support this statement, however. Interestingly, the Task Force did not feel manipulation was contraindicated in the presence of confirmed spinal stenosis.

Central spinal stenosis has not been subjected to a controlled trial of manipulative therapy. Kirkaldy-Willis and Cassidy (1988) feel it responds significantly worse to manipulation than other indications; they report 18% of 11 patients were "symptom free" and an additional 18% had only "mild intermittent pain" after manipulation. These 11 patients were "a small, select group of patients with central spinal stenosis who were unfit for surgery." Cox (1990) states that central spinal stenosis or medial disc protrusion responds poorly to manipulation; he also states that the presence of certain major neurologic findings, such as difficulty walking and rectal difficulties, in the presence of central spinal stenosis or a-medial disc protrusion, is an indication for immediate surgical referral.

SUBACUTE LOW-BACK PAIN

Concerning the appropriateness of treating patients with subacute low-back pain with spinal manipulation, the presence or absence of prior manipulative treatment for the current episode of pain and the response to that treatment is felt by many manipulating physicians to be clinically important. Because of this perception, the appropriateness ratings for subacute low-back pain are divided into two clinical chapters based on prior treatment for the current episode of pain. Because of a lack of scientific studies examining efficacy in this way, this section of the literature review will deal with subacute back pain with or without the presence of neurological findings and sciatic nerve root irritation.

Without neurological findings or sciatic nerve root irritation. No controlled study dealt with patients who have only subacute low-back pain without neurological findings or sciatic nerve root irritation. However, four controlled studies dealt with patients without neurological findings who had either subacute or acute and chronic pain. These results may be useful in assessing the appropriateness of spinal manipulation for subacute low-back pain. The study by Doran (1975) included patients with low-back pain of any duration. Doran's analysis using a chi-square test of distribution showed no benefit for manipulation when compared to any of three control groups. A later reanalysis of these data by Hoehler 19671 using a statistically more powerful test for trend showed a significant benefit for manipulation at 3 weeks (45% vs. 35% improved). Evans (1978) included patients with both subacute and chronic pain who had no signs of femoral or sciatic root compression. Minor neurological findings were presumably excluded, as well as signs of nerve root compression. There was a significant benefit for manipulation on overall pain scores at 3 weeks when compared to treatment with codeine alone, but the

crossover nature of this study and a randomization failure make the validity questionable. Gibson (1985) included patients with both 3ubacute and chronic pain without neurological signs and randomized them to receive diathermy or osteopathic treatment including manipulation. No difference was seen between Groups. Lastly, Waagen (1986) reported on 19 patients with subacute or chronic back pain' 'without neurological findings or sciatic nerve root irritation, who were randomly assigned to manipulation vs. a sham. There was a statistically significant benefit for manipulation on changes in levels of pain as assessed on the Visual Analogue Scale (manipulation = 1.7 cm difference, controls = 0.6 cm difference) at 2 weeks. This study suffered from 10 dropouts (34%) from those initially selected.

In summary, the literature contains conflicting evidence regarding the use of spinal manipulation for patients with subacute low-back pain without neurological findings or sciatic nerve root irritation. The majority of studies suggest that spinal manipulation may have a short-term benefit in terms of pain relief for this class of patients.

Without minor neurological findings but with sciatic nerve root irritation. No controlled study limited its patient population to patients with subacute low-back pain with. out minor neurological findings but with sciatic nerve root irritation. However, two studies may have included this kind of patient, but did not stratify the analysis to answer this question. Mathews (1987) randomized patients with both acute and subacute low-back pain, without minor neurological findings, to manipulation or infrared heat. The analysis was stratified on the presence or absence of straight leg raising signs and/or femoral nerve stretch test. Patients with these signs showed the greatest improvement for manipulation, with a 30% advantage (to complete recovery) for manipulation at 6 days (based on both clinical assessment and patient self-report on the Visual Analogue

Scale). Patients without these signs improved considerably in 2 weeks in both the manipulated group and the nonmanipulated group, with a nonsignificant trend favoring manipulation. The advantage of manipulation was gone by 1 year. The study by Zylbergold (1981) excluded patients with minor neurologic findings; the duration of pain and the presence of sciatic nerve root irritation is unknown. There was no benefit for manipulation when compared to heat and physical therapy in functional status among the 28 patients in the study.

In summary, the literature is insufficient to support or refute the use of spinal manipulation for patients with subacute low-back pain without minor neurological findings but with sciatic nerve root irritation.

With minor neurological findings but without sciatic nerve root irritation. No study examined the benefit of spinal manipulation for patients with subacute low-back pain with minor neurologic findings but without sciatic nerve root irritation. The two studies by Meade most nearly address this question. The studies included patients with both acute, subacute, and chronic low-back pain. Patients with minor neurologic findings were not excluded; those with evidence of nerve root compression were. There was a significant improvement in Oswestry score in both studies for those patients randomized to "chiropractic care" vs. "medical care." The later study showed the benefit to be sustained, up to 2 years at least. Analysis of the later study, stratified on duration of pain greater or less than 1 month, showed no difference in the benefit for chiropractic care for those with acute pain vs. those with subacute or chronic pain.

In summary, the literature is insufficient to either support or refute the use of spinal manipulation for patients with subacute low-back pain and minor neurological findings but without sciatic nerve root irritation.

With minor neurological findings and sciatic nerve root irritation. The study by Coxhead (1981) involved mainly patients with subacute low-back pain who all had sciatica 'and presumably included those with minor neurologic findings as well as those with sciatic nerve root irritation. The results showed a statistically nonsignificant trend toward a benefit for manipulation as compared to three control groups treated with a corset, "back school" or traction at 4 weeks; by 4 months the trend was gone. A later reanalysis of these data by Hoehler (1987), using a more powerful statistical test for trend, showed a benefit for manipulation at 4 weeks (82% vs. 73% improved). Two other controlled trials had patients with minor neurological findings and sciatic nerve root irritation and included subacute low-back pain among others (Hoehler, 1981; Hadler, 1987). The study by Hadier, which was stratified on duration of pain less than 2 weeks or between 2 weeks and 4 weeks duration, showed a benefit for manipulation only in those patients with pain of between 2 and 4 weeks duration (50% greater reduction in pain score at 2 weeks of treatment, compared to controls receiving mobilization). Hoehler's study, which may have included patients with minor neurologic findings and/or sciatic nerve root irritation but was not stratified in that way, showed an immediate benefit for manipulation, which was gone at 3 week follow-up.

In summary, the literature is limited but probably supports the use of spinal manipulation for patients with subacute low-back pain with minor neurological findings and sciatic nerve root irritation, its use conferring a slight short-term benefit in pain relief.

With major neurological findings. No study, controlled or uncontrolled, has described the manipulative treatment of patients with subacute low-back pain and major neurological findings.

Additional issues. Concerning prior treatment, it is many chiropractors' clinical belief that patients with evidence of joint fixation and a recent episode of back pain are at higher risk to relapse than those without evidence of joint fixation. Because of this, they believe that these patients should undergo manipulation to relieve the undesirable joint restriction, with the belief that this will bring a more durable and lasting improvement in symptoms. This series of beliefs has not been subjected to rigorous study.

With regard to the frequency of treatment for the 'patient undergoing manipulation, please refer to the section on "Treatment Duration" for a discussion of the literature.

Spinal manipulation has not been shown to reduce a herniated nucleus pulposus physically. Please refer to the discussion under Additional Issues in the section on acute low-back pain for a review of the literature.

The Quebec Task Force concluded that spinal manipulation is contraindicated in the presence of radicular compression. Please see Additional Issues in the section on acute low back pain for more discussion of this.

Central spinal stenosis has not been subjected to a controlled trial of manipulative therapy. The discussion under Additional Issues in the section on acute low-back pain analysis this topic in more detail.

CHRONIC LOW-BACK PAIN

Analogous to patients with subacute low-back pain, many manipulating physicians feel that the type of and response to prior treatment is important in determining the likelihood of a beneficial effect of spinal manipulation for patients with chronic low-back pain. Reflecting this opinion, the appropriateness ratings for chronic low-back pain are divided into three clinical chapters based on prior treatment, although no scientific studies have examined the object this way. Therefore, this section will deal with chronic back pain with or without the presence of neurological findings and sciatic nerve root irritation. Two case series dealing with response to prior laminectomy will be reviewed.

Without neurological findings or sciatic nerve root irritation. No controlled tri dealt only with patients with chronic low-back pain without neurological signs or sciatic nerve root irritation, treated with manipulation alone. The study by Ongley (1987) included an injection of an experimental "proliferant" to the group treated with manipulation, and the effect of manipulation is impossible to determine. The trials of Evans 1978, Gibson (1985), and Waagen (1896) dealt with patients without neurological findings or sciatic nerve root irritation and had subacute or chronic back pain. manipulation at 3 weeks when compared to controls (45% vs. 35% Evans trial is confounded by the crossover design; Gibsons study showed no benefit; and Waagens study showed a benefit for manipulation, as compared to sham treatment, with improvement measured on the Visual Analogue Scale at 2 weeks. The study by Doran, which excluded minor neurologic findings and sciatic nerve root irritation but took patients with pain of all duration, showed a benefit for manipulation at 3 weeks when compared to controls (45% vs 35% improved). In other studies, Potter (1977) reported an improvement in 64% of patients with chronic low-back

pair, and no leg involvement. Kirkaldy-Willis and Cassidy (1988) report their case series on patients with chronic pain; between 45% and 92% had good recovery, depending on their precise diagnosis.

In summary, the literature gives conflicting evidence on the value of spinal manipulation for patients with chronic low-back pain without neurological findings or sciatic nerve root irritation.

Without minor neurological findings but with sciatic nerve root irritation. No controlled trials examined the effect of manipulation in patients with chronic low-back pain without minor neurologic findings but with sciatic nerve root irritation.

With minor neurological findings but without sciatic nerve root irritation. The only controlled trial to examine this question is the second study of Meade (1990). This study randomized 375 of 717 patients with low-back pain of any duration, some of whom presumably had minor neurologic findings but none of whom had sciatic nerve root irritation, to "chiropractic care" or "medical care." The chiropractic-care group as a whole had significant improvements relative to the medical-care group in Oswestry Score at 6, 12, and 24 months. Stratified analysis showed that patients with pain of more than 1 month's duration responded equivalently to those with pain of shorter duration.

With minor neurological findings and sciatic nerve root irritation. Arkuszewski (1986) has reported the single controlled trial that included patients with only chronic low-back pain and minor neurological findings. Time to pain relief was improved by manipulation as compared to massage (3.1 vs. 3.8 weeks). More impressively, at 6 months 60% of the manipulated group had returned to work compared to 36% of the control group. These results are

limited by the nonrandom assignment of treatment groups and the non-blinded assessment used. Glover (1974), and possibly Edwards (1969) and Sims-Williams (1978), also reported controlled trials of patients that included those with chronic pain and minor neurological findings with sciatic nerve root irritation. These studies showed a short-terra benefit for manipulation that diminished at later follow-up. This diminution was usually due to improvement of the control group rather than deterioration of the manipulated group. In other studies, Mensor (1955), Chrisman (1964), and Kuo 1986 all reported case series of patients with chronic low-back pain and minor neurological findings with sciatic nerve root irritation. In Chrisman's study the patients also had documented disc protrusions. In Mensor's series of 205 cases, between 45% and 64% had excellent or good results, depending on insurance status (private or worker's compensation). The majority of the patients in Chrisman's study had an "excellent" or "good" improvement in pain relief (35/39); however, 10 of these ultimately had recurrence requiring operation. Kuo's series of 517 patients treated over 8 years yielded a 76.8% satisfactory response rate, with 14.1% recurrences. Operative findings in patients unresponsive to manipulation or who relapsed tended to show a central disc protrusion or a "huge" disc protrusion. Potter (1977) reported a 36L~ improvement in patients with chronic low-back pain and neurological findings. Lastly, in the case series of Kirkaldy-Willis and Cassidy (1988), chronic back pain from lesions associated with minor neurological findings and sciatic nerve root irritation had a response rate of between 50 and 60%.

In summary, the literature is not conclusive concerning the use of spinal manipulation patients with chronic low-back pain with minor neurological findings and sciatic nerve.

With major neurological findings. No study, controlled or uncontrolled, has described the manipulative treatment of patients with chronic low-back pain and major neurological findings.

With prior laminectomy. There are no controlled trials of manipulation in patients with chronic low-back pain who have had previous laminectomy. Two case series, however gave somewhat conflicting results. In the series by Potter (1977), prior laminectomy did not alter the response of patients to manipulation with chronic low-back pain, with or without neurological findings. Kirkaldy-Willis and Cassidy (1988), however, report a 72% response rate in patients without prior laminectomy, and a 64% response rate in patients with prior laminectomy for patients with chronic back pain of all kinds.

Additional issues. With one exception, all studies of back pain that have shown duration of symptoms to be a predictor of response to treatment with spinal manipulation have shown the duration of symptoms to be inversely related to the likelihood of response. Bronfort (1986) reported that patients with a shorter duration of symptoms were more likely to respond to chiropractic treatment (15% vs. 65% not cured within 6 months for patients with less than 7 days of initial pain vs. more than 28 days). Similar results were shown by Maitland (1957), Glover (1974), Evans (1978), Potter (1977) and Sims-Williams (1978).

With regard to biomechanical and psychosocial stress, Bronfort showed that the presence of psychological overlay (as defined by the hysteria and hypochondriasis scores on the MMPI), as well as the presence of improper working posture, were associated with poorer response to

chiropractic manipulation. The association of these factors with troublesome Chronic back pain is well recognized in the medical community (K.irkaldy-Wihis, 1988; Frymoyer, 1988).

As discussed in the section on acute low-back pain, spinal manipulation has not been known to reduce physically a herniated nucleus pulposus. Please refer to the discussion on Additional Issues in the section on acute low-back pain for a review of the literature.

The Quebec Task Force concluded that spinal manipulation is contraindicated in the presence of radicular compression. This is also discussed under Additional Issues in the section on acute low-back pain.

Central spinal stenosis has not been subjected to a controlled trial of manipulative therapy. The discussion under Additional Issues in the section on low-back pain analyzes this topic in more detail.

OTHER CONCERNS

Treatment Duration

The scientific literature is not helpful in deciding when a patient should stop being treated with spinal manipulation, either with respect to improvement or worsening of symptoms. The literature reports controlled trials or case series with between 1 and 19 sessions of manipulation lasting anywhere from a single day to 2 months. it is unclear how many, if any, manipulations are necessary after the patient has become pain-free. There is more guidance concerning the patient who is not improving. The utilization guidelines developed by Hansen (1988) define indications for a second opinion to be:

- Treatment of three times a week that exceeds 4 weeks
- No objective or subjective signs of improvement, or worsening of condition, in first 2 weeks.

These recommendations are based on consensus among clinicians and have no experimental evidence to support them. They also only apply to acute or subacute low-back pain from a recent injury. There is no guidance with respect to chronic back pain or to pain not due to an injury.

The Ohio State Chiropractic Association, in their guidelines for utilization, list the pa. rameters in Table 2 as a general guide for care.

La Brot (1989), in his privately published monograph, suggested the following number of visits and treatment duration listed in Table 3.

All of these recommendations, whether by individuals or by consensus, are based on clinical experience and opinion, without rigorous scientific support.

Table 2 -

OHIO STATE CHIROPRACTIC ASSOCIATION GUIDELINES FOR FREQUENCY AND DURATION OF TREATMENT

Conditions	Frequency (number of treatments /time period)	Duration
Acute		
Mild	daily to 3/week	up to 30 days
Moderate	3/week	up to 30 days

	1–2/month	up to 3 months
Severe	3/week	up to 3 months
	1-2/month	up to 5 months
Cbronic		
Mild	3/week	up to 2 months
	1–2/month	up to 6 months
Moderate	3/week	up to 2 months
	1–2/month	up to 12 month
Severe	3/week	up to 4 months
	1–2/month	up to 18 month

Table 3

LA BROTS GUIDELINES FOR FREQUENCY AND DURATION OF TREATMENT

Injuries	Number of Office Visits	Treatment Duration
Traumatic		
Mild	9–17	4 weeks
Moderate	19–45	up to 6 months
Severe	39–68	up to 12 month
Non-Traumatic		
Mild	5-12	4 weeks
Moderate to severe	14–28	up to 12 weeks

Clotting Disorders

In many textbooks and reviews of chiropractic, the presence of clotting disorders ~specifically in reference to patients taking therapeutic anticoagulants) is listed as a contraindication to manipulation. In reviews of the case reports of complications of manipulation, four cases, two serious (paraplegia from meningeal hematoma) and two nonserious petechial rash or ecchymosis), were reported in patients with a clotting disorder who received spinal manipulation. As with other complications of spinal manipulation (see Complications), there is no way of knowing either the total number of complications due to clotting disorders or the

number of patients with clotting disorders undergoing manipulation. Thus there is no way of estimating the frequency with which adverse outcomes occur in this patient population.

Abdominal Aortic Aneurysm

As with clotting disorders, this is listed in many textbooks and reviews of chiropractic as a contraindication to manipulation. No case reports of complications due to abdominal aortic aneurysm have been found.

Spondylolisthesis

No controlled trials exist to determine the prognostic influence of spondylolisthesis on reponse to manipulation for back pain. Mirau (1987) reports that the response of patients with chronic low-back pain with and without spondylolisthesis is equivalent. There is no evidence that spinal manipulation can reduce a spondylolisthesis.

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Appendix
CONTROLLED TRIALS OF SPINAL MANIPULATION

This appendix summarizes the salient features of the controlled trials of manipulation for treatment of back pain.

Author [1,2]	Coyer (1955)(Britain)
Duration of Pain [3]	A
Sciatic Pain/SNI [4,5]	Excluded
Minor Nuerologic Findings [6]	Excluded
Palpatory Findings [7]	None
Manipulation Defined (Type)	Yes (Cyriax)
#Manipulated/Total Sample [8]	
(# of Manip.) [9]	76/136 (1)

Results 50% of manipulated group pain free et 1 week compared to 27% of controls treated with bedrest; values for 6 weeks were 88% and 72%, respectively

Author	Edwards (1969) (Australia)
Duration of Pain	Not Defined
Sciatic Pain/SNI	Included/presumably included
Minor Nuerologic Findings	Presumably Included
Palpatory Findings	None
Manipulation Defined (Type)	Yes (Maitland)
#Manipulated/Total Sample	
(# of Manip.)	92/184 (13 max.)

Results No overall difference between manipulation and heat/massage, but manipulation improved those with sciatic pain and provided relief in half (4.8 vs. 9.7) the number of treatments

Author	Glover (1974) RCT(Britain)
Duration of Pain	A/S+C
Sciatic Pain/SNI	Included/not stated

Minor Nuerologic Findings	Included
Palpatory Findings	Yes
Manipulation Defined (Type)	Yes (Rotational)
#Manipulated/Total Sample (# of Manip.)	43/84 (1)

Results - In general no difference between manipulation and diathermy vs. diathermy alone, manipulation provided better pain relief for those with <7 days of pain and first attach of back pain (61% vs/ 42% mean pain relief at 3 days)

Author	Doran (1975) RCT (Britain)
Duration of Pain	A, S, C
Sciatic Pain/SNI	Excluded
Minor Nuerologic Findings	Excluded
Palpatory Findings	No
Manipulation Defined (Type)	No
#Manipulated/Total Sample (# of Manip.)	116/456 (6 avg.)

Results No difference between manipulation, physiotherapy, corset, and analgesics, using chi-square; later analysis by Hoehler (1987) showed statistical benefit for manipulation (45% vs. 35% improved at 3 weeks)

Author	Bergquist (1955) RCT (Sweden)
Duration of Pain	Mainly A, some S
Sciatic Pain/SNI	Included, included
Minor Nuerologic Findings	Presumably Excluded
Palpatory Findings	Yes
Manipulation Defined (Type)	Yes (Janda)
#Manipulated/Total Sample (# of Manip.)	72/217 (variable)

Results "Combined physiotherapy" including manipulation or "back school" better than diathermy (time to recovery 15.8, 14.8, and 28.7 days, respectively)

Author	Evans (1978) RCT (Britain)
Duration of Pain	S, C
Sciatic Pain/SNI	Included/excluded
Minor Nuerologic Findings	Probably Excluded
Palpatory Findings	No
Manipulation Defined (Type)	Yes (Rotational)
#Manipulated/Total Sample (# of Manip.)	32 (3 weeks)

Results Statistically significant improvement for manipulation vs. codeine in overall pain score for each group, older patients did better than younger, but crossover design, randomization failure make conclusions questionable.

Author	Sims-Williams (1978) RCT (Britain)
Duration of Pain	Not specified
Sciatic Pain/SNI	Included/not stated
Minor Nuerologic Findings	Included
Palpatory Findings	Yes
Manipulation Defined (Type)	Yes (Maitland)
#Manipulated/Total Sample (# of Manip.)	47/94 (14 max.)

Results Significant improvement for manipulation vs. diathermy in return to light work at one month; effect was gone by three months; pain <1 month responded better

Author	Rasmussen (1979) (Denmark)
Duration of Pain	A
Sciatic Pain/SNI	Excluded
Minor Nuerologic Findings	Probably excluded
Palpatory Findings	No
Manipulation Defined (Type)	Yes (Rotational)
#Manipulated/Total Sample	

(# of Manip.)	12/24 (2 weeks)

Results Distinct benefit for manipulation vs. diathermy though non-blinded assessment (10/12) improved with manipulation vs. 3/12 in control group)

Author	Hoehler (1981) RCT (USA)
Duration of Pain	52% A 17% C
Sciatic Pain/SNI	Not stated
Minor Nuerologic Findings	Not Stated
Palpatory Findings	Yes
Manipulation Defined (Type)	Yes (Rotational)
#Manipulated/Total Sample (# of Manip.)	56/95 (5 avg.)

Results Immediate benefit of manipulation vs. sham (84% vs. 68% pain relief); gone by 3 weeks; sophisticated control group.

Author	Coxhead (1981) RCT (Britain)
Duration of Pain	Mainly S
Sciatic Pain/SNI	Only/Presumably Included
Minor Nuerologic Findings	Presumably Included
Palpatory Findings	No
Manipulation Defined (Type)	Yes (Maitland)
#Manipulated/Total Sample (# of Manip.)	155/322 (14 max.)

Results Manipulation possibly slightly better than corset, back school, or traction, certainly better than no treatment, at 4 weeks; gone at 4 months. Later reanalysis by Hoehler (1987) showed statistically significant benefit of manipulation (82% vs. 73% improved) at 4 weeks

Author	Zybergold (1981) RCT (Canada)
Duration of Pain	Not stated
Sciatic Pain/SNI	Not stated
Minor Nuerologic Findings	Excluded
Palpatory Findings	No
Manipulation Defined (Type)	No
#Manipulated/Total Sample (# of Manip.)	8/28 (2/week for 4 wk)

Results Manipulation no better than heat and physical therapy or traction in functional status at 4 weeks

Author	Nwuga (1982) RCT (Nigeria)
Duration of Pain	A
Sciatic Pain/SNI	Only/presumably Included
Minor Nuerologic Findings	Included
Palpatory Findings	No
Manipulation Defined (Type)	Yes (oscillatory rotation)
#Manipulated/Total Sample (# of Manip.)	26/51 (12 max.)

Results Significant benefit for manipulation vs. diathermy for total rotation and straight leg raising compared to baseline for each group, NOT between groups. Significantly shorter time to pain relief for manipulation group (121 min. vs. 160 min. combined total treatment time)

Author	Farrell (1982) RCT (Australia)
Duration of Pain	A
Sciatic Pain/SNI	Included /presumably included
Minor Nuerologic Findings	Excluded
Palpatory Findings	No
Manipulation Defined (Type)	Yes (Maitland)

#Manipulated/Total Sample (# of Manip.)	24/48 (9 max.)

Results Short term benefit for manipulation vs. diathermy, exercises, and instructions; shorter time to pain relief (3.5 vs. 5.8 treatments); no difference in groups at 3 weeks

Author	Godfrey (1984) RCT (Canada)
Duration of Pain	A
Sciatic Pain/SNI	Not stated
Minor Nuerologic Findings	Not Stated
Palpatory Findings	Yes
Manipulation Defined (Type)	Yes (Maigne)
#Manipulated/Total Sample (# of Manip.)	22/81 (5 max.)

Results Trend toward benefit from manipulation vs. massage; later reanalysis by Hoehler (1987) showed statistically significant benefit for manipulation for back mobility (30% vs. 15%), but not overall symptomatology at 2 weeks; chiropractor and M.D. manipulator

Author	Gibson (1985) RCT (Britain)
Duration of Pain	S, C
Sciatic Pain/SNI	Probably excluded
Minor Nuerologic Findings	Excluded
Palpatory Findings	No
Manipulation Defined (Type)	Yes (Minimal rotation)
#Manipulated/Total Sample (# of Manip.)	41/109 (4 max)

Results No benefit in subjective or objective outcomes immediately and at 2, 4, and 12, weeks; control group received diathermy

Author	Arkuszewski (1986)(Poland)
Duration of Pain	C
Sciatic Pain/SNI	Included/included
Minor Nuerologic Findings	Included
Palpatory Findings	No
Manipulation Defined (Type)	No
#Manipulated/Total Sample (# of Manip.)	50/100 (6 avg., 10 max)

Results Time to pain relief improved for manipulation vs. massage (3.1 vs. 3.8 weeks); at 6 months, 60% of manipulated group vs. 36% of control group had returned to old jobs; results limited by nonblinded assessment

Author	Waagen (1986) RCT (USA)
Duration of Pain	S, C
Sciatic Pain/SNI	Excluded
Minor Nuerologic Findings	Excluded
Palpatory Findings	No
Manipulation Defined (Type)	Yes (Chiropractic adjustments)
#Manipulated/Total Sample (# of Manip.)	9/19 (4 avg)

Results Benefit for manipulation vs. sham on Visual Analogue Scale measurements of pain immediately and at 2 weeks (0.6 and 1.7 difference between groups on VAS immediately and at 2 weeks, respectively); manipulations were given by chiropractor; 10 dropouts from enrollees

Author	Meade (1986) RCT (Britain)
Duration of Pain	A, S, C
Sciatic Pain/SNI	Not excluded/ excluded
Minor Nuerologic Findings	Included

Palpatory Findings	No
Manipulation Defined (Type)	No
#Manipulated/Total Sample (# of Manip.)	23/50 (unknown)

Results Mean improvement in Oswestry Score between 0 and 6 weeks was 3.0 for those treated at medical clinic with exercises, traction, hydrotherapy, and possibly manipulation vs. 10.7 for those treated at chiropractic clinic; chiropractic manipulation

Author	Ongley(1987) RCT (USA)
Duration of Pain	C
Sciatic Pain/SNI	Excluded
Minor Nuerologic Findings	Not excluded
Palpatory Findings	No
Manipulation Defined (Type)	Yes (Sacroiliac lumbar roll)
#Manipulated/Total Sample (# of Manip.)	40/81 (1)

Results Experimental group had significantly better outcomes on validated questionnaire; addition of injection of "proliferant" to experimental subjects makes interpretation of effect of manipulation alone difficult

Author	Hadler(1987) RCT (USA)
Duration of Pain	Mainly A, some S
Sciatic Pain/SNI	Included/presumably included
Minor Nuerologic Findings	Included
Palpatory Findings	No
Manipulation Defined (Type)	Yes (Lumbar rotation)
#Manipulated/Total Sample (# of Manip.)	28/54 (1)

Results No overall difference in balidated back pain questionnaire between manipulation and mobilization, but

patients with pain of 2 to 4 weeks duration achieved a 50% reduction in pain score more rapidly with manipulation than with mobilization

Author	Mathews(1987) RCT (Britain)
Duration of Pain	A, S
Sciatic Pain/SNI	Included/included
Minor Nuerologic Findings	Excluded
Palpatory Findings	Yes
Manipulation Defined (Type)	Yes (Rotation; straight thrust)
#Manipulated/Total Sample (# of Manip.)	165/291 (up to 10)

Results Benefit for manipulation in patients with straight leg raising signs both subjectively and objectively at 2 weeks (30% difference in recovery rate); controls were given infrared heat. Patients without straight leg raising signs improved greatly but not significant; no difference at one year

Author	Meade(1990) RCT (Britain)
Duration of Pain	A, S, C
Sciatic Pain/SNI	Not Excluded/ excluded
Minor Nuerologic Findings	Presumably included
Palpatory Findings	No
Manipulation Defined (Type)	No
#Manipulated/Total Sample (# of Manip.)	375/717 (9 avg.)

Results Comparison of "chiropractic care" vs. "medical clinic care" for patients with back pain; 99% of chiropractic patients were manipulated, some medical patients were manipulated as well. Significantly greater improvement in Oswestry Score in chiropractic group at 6, 12, and 24 months; improvement in physiologic variables

greater for chiropractic group as well. Patients with subacute and chronic pain improved similarly to those with acute pain.

NOTES:

1. First author and year of publication are provided for each study.
2. Studies designated RCT had random allocation of subjects
3. A=Acute; S=Subacute; C=Chronic.
4. Inclusion or exclusion of patients with with typical sciatic pain is listed; "only" refers to studies which included only patients with sciatic pain.
5. SNI means sciatic nerve root Irritation, defined as typical sciatic pain and a positive Ipsilateral straight leg raising sign (positive – pain distal to knee).
6. Minor neurologic findings are one of the following-, decreased ankle reflex, dermatomal sensory deficit, or nonprogressive motor weakness.
7. Palpatory findings refers to the use of specific physical findings thought to be Indicative of joint fixation as a criterion for entry.
8. "# manipulated" refers to the number of subjects in the manipulation group.
9. " #of manip." refers to the number of manipulative sessions during the study.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

American Chiropractic Association, Inc., et al.,	)	
	)	CASE NO. 1:00 CV 00113
Plaintiffs	)	
	)	Judge James P. Jones
v.	)	
	)	
Trigon Healthcare, Inc., et al.)		
	)	
Defendants.	)	

DECLARATION OF
SCOTT HALDEMAN, M.D., Ph.D., D.C.

1. My current position and qualifications are set out in my expert witness report served in this action and attached hereto as Exhibit A. That report is accurate and based on reliable and generally accepted or otherwise reliable sources.

2. I have reviewed the declaration of J. Lawrence Colley dated August 6, 2002, and \particularly paragraphs 7 through 12 of that affidavit concerning The Agency for Health Care Policy and Research (AHCPR) Clinical Practice Guideline No. 14, Acute Low Back Problems in Adults, AHCPR Publication No. 95-0642,and Quick Reference Guide for Clinicians, AHCPR Publication No. 95-0643, and Trigon's Clinical Practice Guideline Managing Low Back Problems in Adults. I served on the AHCPR Panel on Acute Low Back Pain in Adults.

3. Dr. Colley states, at paragraph 8, that the flow chart in Trigon's clinical practice guideline is more favorable to chiropractors than the flow charts of the AHCPR

publications because the AHCPR flow charts do not mention manipulation. This statement is profoundly misleading. The AHCPR's flow charts, page 138 of the Clinical Practice Guideline and p. 15 of the Quick Reference Guide for Clinicians, refer to treatment options. The Quick Reference Guide refers to a table in which the options and recommendations, including a recommendation of manipulation, are specifically set out. When the references contained in the AHCPR flowcharts are not ignored, it is clear that the AHCPR publications are a clear endorsement of manipulation as practiced by doctors of chiropractic where the Trigon clinical guideline is not.

4. The Trigon clinical guideline is inconsistent with the AHCPR Guidelines in many ways including the omission of any definition of manipulation which the AHCPR Guideline includes. Specifically, the Trigon clinical guideline refers only to manipulation. Manipulation is a generic term that encompasses a number of physical treatments from vigorous back massage to the type generally used by doctors of chiropractic, some osteopathic physicians, a relative handful of M.D.s and a relative handful of physical therapists. A study of members of The Rand Corporation estimated that chiropractors perform over 90% of spinal manipulations in the United States.

The AHCPR Clinical Practice Guideline, No. 95-0642, states beginning at p. 34:

> Spinal manipulation includes many different techniques. For this guideline, manipulation is defined as manual therapy in which loads are applied to the spine using short or long lever methods. The selected joint is moved to its end range of voluntary motion, followed by application of an impulse loading. The therapeutic objectives of manipulation

include symptomatic relief and functional improvement.

This definition refers to manipulation techniques learned by chiropractors during an extensive course of study. The AHCPR Quick Reference Guide for Clinicians, No. 95-0643, states at p. 12 that manipulation is "defined as manual loading of the spine using short or long leverage methods."

5. By omitting the AHCPR's definitions of manipulation, Trigon and its Managed Care Advisory Panel materially altered the recommendations of the AHCPR. That alteration created a Trigon guideline that did not recommend the manipulation that is provided primarily by doctors of chiropractic as did the AHCPR Guidelines. A point that became evident from the AHCPR guidelines was that manipulation was the only treatment approach that required a medical physician, in most instances, to make a referral of a patient with uncomplicated low back pain. The inevitable, and obviously intended, consequence of Trigon's and the Managed Care Advisory Panel's alteration of the AHCPR guideline, is to deprive patients of the benefit from spinal manipulation as practiced by doctors of chiropractic, and to deprive doctors of chiropractic of the opportunity to treat those patients.

Furthermore, the documents provided to me on the position of Trigon health Care in the treatment of neck and back pain are clearly in conflict with the recommendations from the most rigorous systematic reviews of the medical literature for the following reasons:

TRIGON HEALTH CARE GUIDELINES AND CRITERIA FOR THE TREATMENT OF BACK AND NECK PAIN.

The process used to develop the Trigon Health Care Guidelines

I have reviewed information concerning the qualifications and specialties of the members of the Trigon Provider Policy Committee and the Managed Care Advisory Panel as well as excerpts from minutes of meetings of the latter. I have reviewed sections of the depositions of Dr Grinnan and Dr Colley. The following appear to be reasonable conclusions from these documents.

1. It appears that the Managed Care Advisory Panel was responsible for the development and approval of treatment guidelines for Trigon Healthcare. The panel of physicians who developed and approved the Guidelines do not appear to include specialists whose training and primary case load is the treatment of back and neck pain or cervicogenic headaches. It appears that osteopathic physicians, chiropractors, and physical therapists who treat a large section of the population with back and neck pain and are the primary clinicians who utilize such procedures as spinal manipulation were not included in this panel. It is also not clear that there are any individuals in this panel with experience and training in epidemiology and clinical methodology, or who have experience in developing guidelines for conditions that are associated with the spine arid related disorders.

2. It is not evident that a systematic review of the medical and scientific literature was performed prior to developing the Trigon guidelines. There is a general consensus within the scientific medical community that systematic reviews of the scientific literature are a necessary and essential component in the development of evidence based treatment approaches and outcomes based recommendations. They are also only valid if they incorporate practitioners of all specialties that deal with the condition in question and that there be individuals with experience in methodology and epidemiology within the specialty to provide criteria to assess the scientific literature. This is necessary in order to ensure that the interpretation of this literature is consistent with clinical practice.

3. It is not evident from these records that the guidelines were developed using an established consensus methodology with active debate amongst the members of the panel. It is not evident that these guidelines were sent out to peer reviewers and consultants to ensure their accuracy. Furthermore, it is not evident that these guidelines were ever open to public review as is generally recommended.

<u>The Trigon Health Care Guidelines relative to other established Guidelines.</u>

I am in receipt of a report entitled "Managing Low Back Problems in Adults". This is described as a clinical practice guideline produced by Trigon Blue Cross/Blue Shield. There is a series of algorithms that look very similar to the AHCPR guidelines.

There is a marked discrepancy between the guidelines produced by the AHCPR and those

produced by Trigon in the table noted under "Treatment at Initial Visit". Under point 1, it recommends nonprescription analgesic medication, such as acetaminophen and NSAIDs. Under point 2, it suggests that a short trial of manipulation may be as effective as NSAIDs. This is clearly a deviation from the AHCPR guidelines, which suggested that manipulation could be used in place of medication or a shorter trial, if combined with NSAIDs. Under section 3, it recommends physical methods, but it is clear in the AHCPR guidelines that these treatment approaches are of very equivocal efficacy. The Trigon guidelines recommend heat or cold modalities, but in the AHCPR guidelines it suggested that these should only be used for home programs. The Trigon guidelines also recommend rest, whereas the AHCPR guidelines actually recommended against rest except in the presence of severe sciatica, and then for not more than two days. The Trigon guidelines also make no mention of manipulation as an option in patients with sciatica as noted in the AHCPR guidelines.

The Trigon guidelines made available to me provide no justification for this marked deviation in the recommended treatment approaches when compared to the AHCPR guidelines. Following the Trigon guidelines would lead to increasing costs of health care by justifying rest, which is known to prolong disability, and providing payments for heat and home modalities in an office, for which there is no justification. The failure to recommend manipulation as an initial treatment for acute low back pain would likely lead to increased symptomatology and prolonged disability.

Trigon policy on reimbursing manipulation.

I am in receipt of an office advisor document from Trigon dated July 1997. This document states, "It is Trigon's position that manipulation of more than two regions would rarely be evidence-based and/or medically necessary. Conclusive peer-reviewed evidence of manipulation efficacy is limited to lumbar spine procedures."

This is clearly in conflict with the current medical evidence and consensus guidelines, which suggest that manipulation is a reasonable approach to the treatment of neck pain, and there is at least as much or more evidence for the use of manipulation in neck pain than most other treatment approaches.

It is also in conflict with current scientific evidence on the different treatment approaches to cervicogenic headaches where there is again reasonable evidence in support of manipulation or at least more than other treatment approaches.

It is also in conflict with current epidemiologic evidence that it is common for patients to suffer from pain in multiple regions at the same time. Patients with low back pain commonly have neck or thoracic pain that would require treatment of multiple areas of the spine.

The minutes of the Managed Care Advisory Panel of October 25, 1995 include a discussion of the guidelines to be approved by this panel. Dr Colley emphasized that they were referral guidelines. Despite this policy it appears that this committee elected to utilize the words "may" and "should" instead of "may refer" or "should refer" in the

guidelines. A point that became evident from the AHCPR guidelines was that manipulation was the only treatment approach that required a family physician to make a referral of a patient with uncomplicated low back pain. The failure to emphasize the word "refer" is therefore most likely to impact practitioners of manipulation.

CONCLUSIONS

There is a strong need to develop and maintain guidelines for the treatment of back and neck pain which are based on an honest and systematic review of the medical literature in order to develop evidence based treatment approaches for back and neck pain.

When systematic review of the literature and consensus panels have been performed, the scientific literature clearly support a primary role for manipulation in the treatment of low back pain, and that the evidence for manipulation in the treatment of neck pain is equal to or better than almost all other treatment approaches.

The documents provided to me on the position of Trigon Health Care in the treatment of neck and back pain are clearly in conflict with the recommendations from the most rigorous systematic reviews of the medical literature.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Scott Haldeman
Scott Haldeman, M.D., Ph.D

SCOTT HALDEMA.N, M.D., Ph.D., F.R.C.P. (C)
A Professional Corporation
Consulting Neurology

Diplomate American Board of
Neurology and Psychiatry (Neurology}

1125 East 17th Street
Suite W-127
Santa Ana, California 92701

Telephone (714) 547-9822
FAX (714) 547-0443
E-Mail: HaldemamMD
@aol.com

July 27, 2002

Re: American Chiropractic Association, Inc., et al., vs. Trigon Health Care, Inc., et al. Civil Action: 1-00CV00113

EXPERT WITNESS REPORT

I have reviewed a series of documents referred to this office and have conducted independent research on the issues that appear to be germane to this case. The following is a report outlining my opinions in an attempt to answer questions that arise from these documents.

A copy of my Curriculum Vitae and bibliography is attached. The following are points from my curriculum vita that may be relevant to the questions posed by this case. Compensation for my time in the preparation of this report was a rate of $400 per hour.

QUALIFICATIONS

I am a graduate of Palmer College of Chiropractic in Davenport, Iowa, where I received a DC degree as valedictorian. I completed a Bachelor's and a Master's degree in Science at the University of Pretoria, South Africa. The Master's degree is in the field of neurophysiology, and

was achieved with honors. I received my Ph.D. at the University of British Columbia in Vancouver in the field of neurophysiology. I then completed a medical degree at the University of British Columbia, followed by an internship in internal medicine at Vancouver General Hospital. I completed a residency in neurology at the University of California at Irvine followed by a fellowship in electrodiagnosis at the Long Beach Veterans Administration Medical Center. I subsequently completed the training to become certified by the American Board of Psychiatry and Neurology and a diplomate of the American Board of Electroencephalography and Neurophysiology, the American Board of Clinical Neurophysiology and the American Board of Electrodiagnostic Medicine. I am a Fellow of the Royal College of Physicians of Canada and a Fellow of the College of Chiropractic Sciences in Canada.

EXPERIENCE

I currently hold a position of Clinical Professor in the Department of Neurology at the University of California at Irvine. I hold the position of Adjunct Professor in the Research Department at the Southern California University of Health Sciences. I have served as President of the North American Spine Society and on multiple committees of that society. I served for almost 10 years on the board of the American Back Society, and I currently hold the position of Chairman of the Research Council of the World Federation of Chiropractic. I am Editor in Chief of the *Journal of the Neuromusculoskeletal System* and section-editor of "The *Spine Journal*'. I am on the editorial boards of the *Journal of Manipulative and Physiological Therapeutics, Spine, the Journal of the Canadian Chiropractic Association,* and the *Journal of the Australian Chiropractic Association.*

I have had the privilege of serving on a number of consensus and guidelines expert panels that evaluated scientific evidence in favor of various treatment approaches.

I was on the panel on *Acute Low Back Pain in Adults* established by the U.S. Department of Health and Human Services Agency for Health Care Policy and Research. I chaired the panel to establish *Guidelines for Chiropractic Quality Assurance and Standards of Practice,* and I am an advisor to the guidelines committee of the North American Spine Society. I acted as facilitator of a subcommittee asked to assess the value of procedures used for the *Neurological Evaluation of Male Sexual Dysfunction* that presented a report for the Therapeutics and Technology Assessment Subcommittee of the American Academy of Neurology. I am currently President of the *Bone and Joint 2000-2070 Task Force on Neck Pain and its Associated Disorders.* Each one of these committees was established to look at the available scientific evidence in support of specific assessment or treatment procedures and perform a best evidence analysis for specific treatment approaches or for specific conditions.

SPECIFIC QUESTIONS

Following a review of the material before me I will attempt to complete the following tasks.

1. Briefly describe the history of chiropractic and its relationship to formal medical organizations and agencies.

2. Discuss guidelines, consensus conferences, and best evidence syntheses that have been performed by different agencies and individuals on various treatments for back pain, neck pain, and cervicogenic headaches. These three conditions account for 90% of all chiropractic treatments.

3. Review the guidelines established by Trigon Health Care, Inc., and compare those guideline's with the established best evidence synthesis and clinical guidelines established by other learned bodies.

BRIEF HISTORY OF CHIROPRACTIC

Definitions of chiropractic and spinal manipulation.

There are multiple definitions for spinal manipulation and for the practice of chiropractic that have been developed over the years.

For the purposes of this discussion, spinal manipulation will be considered to include all maneuvers where the hands are used to stretch, mobilize, or manipulate the spine and paraspinal tissues for the purposes of relieving spine-related pain and dysfunction. There are multiple techniques including various forms of mobilization, low force manipulations and high velocity, low amplitude adjustments. Spinal manipulation is offered as a treatment modality by chiropractors, osteopathic physicians and to a lesser extent by physical ~therapists and a small number of medical physicians.

The Agency for Health Care Policy and Research panel *on Acute Low back Pain in Adults* developed a very specific definition of spinal manipulation that is important in these proceedings as there appears to have been reliance on these guidelines by Trigon Healthcare Inc. The AHPR panel made the following statement: " Spinal manipulation includes many different techniques. For this guideline, manipulation is defined as manual therapy in which loads are applied to the spine using short and long lever methods. The selected joint is moved to its end range of voluntary motion, followed by application of an impulse loading. The therapeutic objectives of manipulation include symptomatic

relief and functional improvement."

For the purpose of this discussion, chiropractic will be defined as a health care profession as licensed in every state and province in the United States and Canada and in multiple countries throughout the world. The primary treating approach utilized by chiropractic includes various forms of spinal manipulation. It has been estimated that over 90% of all spinal manipulative treatments in the United States are performed by chiropractors. This, however, is not the only procedure offered by chiropractors. Many chiropractors utilize various physical modalities and rehabilitation procedures as well as the use of nutrition advice and counseling.

Medical associations and agencies are defined as associations or committees where the membership is either exclusively or primarily made up of medical physicians.

The practice of spinal manipulation:

Spinal manipulation is one of the oldest and most widely utilized procedures to be offered patients with spine-related pain symptomatology. References to spinal manipulation and the term subluxation can be traced back as far as Hippocrates and Galen. Manual and manipulative procedures have been depicted in the art and writings of most ancient cultures. Although manipulation has been part of orthopedic medical practice for centuries, most non-medical practitioners of spinal manipulation in the 19th century were "bonesetters" who learned their skills primarily through apprenticeship and observation.

At the end of the 19th century, Andrew Still and David Daniel Palmer formalized the practice of spinal manipulation into the professions of osteopathy and chiropractic. Osteopathy elected to assume an increasingly

allopathic practice model with a gradual reduction in interest and training in spinal manipulation. Although a significant number of osteopaths still practice spinal manipulation, the majority function as medical specialists and family practitioners.

Chiropractic, on the other hand, maintained its primary interest in spinal manipulation. There has been a progressive growth in the amount and quality of clinical and experimental research that has led to increasing acceptance of chiropractic and spinal manipulation.

This has resulted in a renewed interest in spinal manipulation by osteopathic physicians and incorporation of spinal manipulation into the practice of certain physiotherapists and a small cadre of medical physicians who have learned these techniques primarily in post-graduate education programs. It has been estimated that it takes approximately 1 year of full time training or 5 years of part-time training for a graduate medical physician or physical therapist to become efficient in the diagnostic and manual skills necessary to practice spinal manipulation competently.

A number of medical and chiropractic historians have reviewed the history of chiropractic over the last 20 years, and there is now an official Association for the History of Chiropractic with its own journal. It is not possible to review the events that have led to the growth of chiropractic over the past 100 years.

From the beginning chiropractors understood that professional self-regulation and independent legal status were crucial to survival. Although chiropractic as a profession originated in the United States, it took less than 10 years for chiropractors to emigrate and begin practicing in other countries. In 1923, the province of Alberta in

Canada became the first jurisdiction to license chiropractors outside the United States, and in 1939 the county of Zurich in Switzerland was the first to license the profession outside of North America. Today, chiropractors are licensed and regulated in many countries throughout the world, including a number of European countries, South Africa, Australia and New Zealand, and Hong Kong. The World Federation of Chiropractic now has membership associations from 74 different countries.

A brief review of the status of chiropractic and its evolution is outlined in a recent paper published by Meeker and Haldeman from the *Annals of Internal Medicine* (2002;136:216-227). This paper also discusses the role of chiropractic in health care, chiropractic training and licensure, and a description of diagnostic and treatment methods commonly employed by practicing chiropractors.

Relationship between medical physicians and chiropractors.

In the first few decades of chiropractic practice, there appeared to be relatively good relationships between individual medical physicians and chiropractors. Many medical physicians taught at chiropractic colleges. Following the Flexner report and the strengthening and control of the medical profession by the American Medical Association, it became unethical for medical physicians to interact with chiropractors. This led to isolation of chiropractors and chiropractic institutions. This greatly reduced the ability of chiropractors to access research resources and scientific institutions. In my opinion, this greatly decreased the evolution of chiropractic science and research from the 1960's to the early 1980's.

During my medical training I was informed by the registrar of the College of Physicians and Surgeons in Canada that it would be unethical to interact with a

chiropractor under any circumstances. I was also told by the professor and head of the Department of Neurology at the University of California at Irvine that "chiropractors should be wiped from the face of the earth". It was considered unethical for a chiropractor to be involved in medical associations and for medical physicians to accept referrals from chiropractors or refer patients to chiropractors.

This situation underwent significant changes in the 1970's and 1980's. The first formal interaction between chiropractors and medical physicians was the conference on "'*The Research Status of Spinal Manipulation*" sponsored by the National Institute of Neurological and Communicable Diseases and Stroke that issued a formal report in 1975. This conference, for the first time, incorporated speakers with qualifications in chiropractic, osteopathy, multiple medical specialties, and the basic sciences. It was this conference that stimulated research interest into spinal manipulation by chiropractors, osteopathic physicians, and medical practitioners who practiced this therapeutic approach.

During the 1970's, the last few states and provinces in North America passed legislation to license chiropractors. During this period there was also increased interest in chiropractic in other countries around the world. Various commissions and formalized committees were established to look into the role of chiropractic in health care. The most prominent and independent of these commissions was the Royal Commission bf Inquiry on Chiropractic in New Zealand, which issued a report in *1979.* They found that chiropractors had greater training in spinal mechanics and manual therapy than any of the other health care professions, and recommended that chiropractic be integrated into the health care system.

The factor that caused the greatest change in the relationship between chiropractors and medical physicians, and between medical institutions and chiropractic institutions was the resolution of the civil action entitled Chester Wilk, D.C., et al., vs. American Medical Association, et al. Following the change in medical ethics, there was a rapid growth in the interaction between chiropractors and medical physicians on multiple levels. There was a progressive increase in the rate of referral of patients by chiropractors to medical physicians and by medical physicians to chiropractors. A survey of family physicians and chiropractors in North Carolina found that two-thirds of medical physicians felt "moderately" or "very" informed about chiropractic, 65% admitted to referring patients to chiropractors, and 98% of chiropractors made routine referrals to physicians.

Chiropractic integration into multidisciplinary spine care centers has grown progressively over the past 10 years. Graduates of chiropractic colleges have been admitted and completed advanced degrees in medicine, epidemiology, and the basic sciences. These chiropractic scientists and chiropractic clinicians have used their scientific skills to further investigate the role of chiropractic in the community and the role of spinal manipulation in health care.

Mainline medical associations have opened their doors to chiropractors. Chiropractors now have their own division within the American Society of Public Health. Chiropractors have been on the board of the American Back Society for over 10 years, and participate in virtually all of their conferences. Chiropractors have been accepted as members in the International Society of the Lumbar Spine and the North American Spine Society. The North American Spine Society has a special interest group devoted to chiropractic. Chiropractic scientists commonly present papers at international meetings on biomechanics, public

health, spinal disorders, and epidemiology, as well as neurophysiology.

EVIDENCE BASED GUIDELINES

In the 1970's and 1980's, there was a marked proliferation of medical procedures used for the treating of patients with back and neck pain. There was a progressive increase in the cost of treating patients with back and neck pain, and it became evident that the scientific basis and evidence in favor of many of *these* treatments was inadequate. *Despite* marked increase in the cost of treating patients with back and neck pain there was an increase in the amount of disability due to these disorders. It became evident that it was necessary to systematically evaluate the scientific research and clinical trials and to develop guidelines outlining treatments most likely to benefit patients with back and neck pain.

The process of systematic reviews of the scientific literature and the development of guidelines is not unique to the treatment of spinal disorders. The basic principle of reviewing the literature and the development of evidence-based guidelines has replaced medical opinion as the most important and valid form of determining whether a treatment approach is reasonable and beneficial. The process of developing a best evidence synthesis and valid guidelines for treatment have undergone intensive study and is only considered valid if it has a number of well-defined components. These include the formation of a committee that includes representatives of all clinicians that have interest or knowledge of the topic and preferably with non-provider input. The process must be open and visible in its proceedings. It should include an in-depth analysis of the scientific literature outlining the method of determining the value of articles to be included for analysis. The guidelines should then be sent out for expert review and comment. A

public hearing to obtain input from interested parties not included in the review should follow this.

For the purpose of this presentation I will review three of the most commonly quoted guidelines that have been published for the treatment of back pain and neck pain with a critical review of cervicogenic headaches.

AHCPR Guidelines on Acute Low Back Problems in Adults.

This multidisciplinary panel comprised of health care professionals and consumer representatives who were brought together by the Agency for Health Care policy and Research to perform an evidence-based analysis of the research trials on all treatment approaches to acute low back pain in adults. I had the privilege of being a member of this panel that was chaired by Dr. Stanley Bigos, Professor of Orthopedic Surgery at the University of Washington in Seattle. This panel conducted a literature search for all articles published after 1984, and included articles, which may have been published prior to that date. Abstracts of over 10,000 papers were reviewed, and almost 4,000 articles were retrieved. Both assessment and treatment methods were studied, and an initial set of criteria for assessing the strength of evidence in favor of various treatment approaches was developed. Panel findings and recommendations for the primary assessment and treatment methods in use were developed by evaluating the research on the topic and by consensus where research was not available. This was an extraordinarily detailed and prolonged process, which continued over a period of almost two years. The results of this process were put out to peer review and subjected to public comment in an open forum. The results of this process are included in *Clinical-Practice Guidelines*, #14, "Acute Low Back Problems in Adults", published by the U.S. Department of Health and, Human Services. Algorithms were developed for the initial

assessment of acute low back pain symptoms, treatment of acute low back problems on the initial and follow-up visits, evaluation of the slow-to-recover patient, the surgical consideration for patients with persistent sciatica, and further care for acute low back problems.

Many of the recommendations were to rule out so-called "red flags" suggestive of severe or progressive pathology affecting the spine. It was recognized that only a very small percentage of patients have these red flags. In the absence of red flags, a series of recommendations was made. These included the provision of assurance that recovery is expected, recommendations for activities to avoid debilitation and reduce the risk of recurrence, support a return to work or required daily activities, and education that the patient can begin muscle-conditioning exercises after a few weeks.

A series of recommendations was given, which could be prescribed as comfort options based on a risk-benefit analysis and patient preference. The recommendations for symptom control are included in Table 2 of the *Quick Reference Guide for Clinicians.* Recommendations were for acetaminophen and NSAIDs, as well as manipulation in place of medication, or a short trial of manipulation combined with NSAIDs. No other treatment had sufficient quality of evidence to reach the level of recommendation. Treatment options included muscle relaxants and opioids for short periods, heat and cold modalities for home programs only, possibly shoe insoles, manipulation in place of medication, or combined with NSAIDs, if the patient has sciatica, with a few days of rest only in the presence of sciatica.

An outline of the levels of evidence in favor of different treatment approaches determined by this panel is noted in the table.

ACUTE LOW BACK PAIN IN ADULTS
Evidence based guidelines
(Bigo et al, AHCPR, 1994)
(A = strong research based evidence, B = moderate evidence, C = limited evidence, D = no information)

TREATMENT		LEVEL OF EVIDENCE
Patient education	Low back pain	Recommended (B)
Back school	Low back pain	Contradictory evidence (C)
Acetaminophen	Low back pain	Limited evidence (C)
NSAID	Low back pain	Moderate evidence (B)
Phenylbutazone	Low back pain	Not recommended (C)
Muscle relaxants	Low back Pain	Option, not combined (C)
Opioid analgesics	Low back pain	Limited time course (C)
Oral steroid	Low back Pain	Not recommended (C)
Colchicine	Low back pain	Not recommended (B)
Antidepressant medications	Low back pain	Not recommended (C)
Spinal manipulation	Low back pain	Strong evidence (B)
Spinal Manipulation	Radiculopathy	Option (C)
Physical agents and modalities	Low back pain	Not recommended (C)
TENS	Low back pain	Not recommended (C)
Shoe insoles and shoe lifts	Low back pain	With prolonged standing (C)
Lumbar Corsets and Back belts	Low back pain	No evidence (D)
Traction	Low back pain	Not recommended (B)
Biofeedback	Low back pain	Not recommended (C)

Trigger point and Ligamentous injections	Low back pain	Not recommended (C)
Facet joint injections	Low back pain	Not recommended (C)
Epidural injections	Low back pain	No evidence (D)
Epidural injections	Radicular pain	Option (C)
Acupuncture	Low back pain	No studies (D)
Activity modification	Low back pain	Limited evidence (D)
Bed rest	Low back pain	Not recommended (B)
Exercise, conditioning, aerobic	Low back pain	Limited evidence (C)

Quebec Task Force on Whiplash-Associated Disorders.

This task force was convened in Quebec, Canada for the purpose of developing a scientific monograph on the evaluation and treatment of patients who had neck pain and disorders associated with whiplash injuries. This scientific secretariat consisted of a multidisciplinary team dominated by epidemiologists and clinical methodologists with input from clinicians from all major health specialties that treat patients with neck pain. This task force developed a classification for whiplash-associated disorders and conducted a best evidence synthesis, reviewing all medical literature on the topic. This was published as a supplement to the journal *Spine (Vol* 20, #8S) and published on April 15, 1995.

After review of the scientific approaches, it was recommended that soft collars not be used, and that prescription drugs have a limited role in the management of whiplash-associated disorders and should be used sparingly. It was recommended that rest be seldom used. -

It was felt that manipulative treatment by a trained person for the relief of pain and facilitation of early mobility could be used in whiplash-associated disorders. Physiotherapy should emphasize early return to usual activity and the promotion of mobility. Surgery was felt to be rarely indicated, and only with progressive neurologic deficits. '

Swedish Council on Technology Assessment in Health Care.

A recently published textbook edited by Alf Nachemson and Egon Jonsson (Neck and Back Pain. The Scientific Evidence of Causes, Diagnosis, and Treatment. Lippincott, Williams and Wilkins, Philadelphia, 2000) presents the results of detailed evidence-based systematic review of the medical literature on the evaluation and treatment of patients with back and neck pain. This was done under the auspices of the Swedish council on technology assessment in health care and was published in 2000. It utilized the criteria of the Cochranc collaboration for evidence-based medicine, it was felt that evidence-based medicine is an approach to practicing medicine in which the clinician is aware of the evidence in support of his or her clinical practice and the strength of that evidence. They developed strength of evidence criteria for acute and subacute low back pain, chronic low back pain, acute and subacute neck pain, and chronic neck pain, as well as other conditions.

The final recommendations for treatment of acute low back pain recommended against the use of bed rest for simple back pain. It recommended that the patient stay as active as possible to continue normal daily activities. Paracetamol and NSAIDs at regular intervals for a fixed period could be offered, if required for pain relief. It was recommended that manipulative treatment within the first six weeks for patients who need additional help with pain relief or those who are failing to return to normal activities be considered. Patients should be advised to increase their physical activities gradually. It should be noted that the literature described moderate evidence that manipulation is more effective than a placebo treatment for short-term relief of acute low back pain, but because of inconsistent findings it was not possible to judge whether manipulation is more effective than other physical therapeutic applications. The risks were considered low, provided the treatment is carried out by a trained therapist or practitioner. It should be noted that there was no evidence available for the use of antidepressants, systemic steroids, or epidural injections in low back pain without nerve root pain, trigger point injections, facet joint injections, and many other commonly used medical treatment approaches. The levels of evidence are noted in the table.

ACUTE AND SUBACUTE LOW BACK PAIN
Levels of Evidence
A=strong, B--moderate, C=limited or contradictory,
D--no evidence
(Van Tulder MW and Waddell G. 2000)

TREATMENT	OUTCOME	COMPAR-ISON GROUP	LEVEL OF EVIDENCE
NSAIDs	Pain Relief	Placebo	Strong positive(A)
NSAIDs	RTW,	Placebo	Strong

	Natural history, Chronicity		negative(A)
Anti-depressants			No evidence(D)
Systemic steroids		Placebo	Not effective (C)
Epidural steroids	Back pain without root pain	Placebo	Limited Positive(C)
Epidural steroids	Back pain without root pain	Placebo	No evidence(D)
Trigger point injections			No evidence(D)
Facet injections			No evidence(D)
Bed rest	Multiple	Multiple	Strong negative(A)
Normal activity	Recovery disability	Analgesics and bed rest	Strong positive(A)
Specific exercises	Low back pain	Multiple	Strong negative(A)
Manual therapy	Pain Relief	Placebo	Moderate positive(B)
Manual therapy	Other therapies	Multiple	Inconsistent findings(C)
TENS	Low back pain		Conflicting (C)
Acupuncture			No evidence(D)

In the evaluation of conservative treatment for chronic low back pain, the recommendations for treatment were limited to providing information to the patient to avoid dependency on medical treatment, and the avoidance

of long-term drug treatment, with prescriptions only for fixed time periods. It was noted that, "The patient should be referred for manual therapy for pain relief." It was also recommended that patients be referred for exercise therapy to improve daily activity and that the intensity of exercise should be gradually increased. Multidisciplinary treatment aimed at functional restoration or behavioral management or pain management was felt to be reasonable. In this review of evidence, it was felt that there was strong evidence that manual therapy provided more effective short-term relief than placebo treatment. There was moderate evidence that manual therapy was more effective than usual care by a general practitioner, bed rest, analgesia, and massage for short-term pain relief. There was limited and conflicting evidence of any long-term effects. It was felt that there were various degrees of evidence for procedures like epidural steroid injections, electromyographic biofeedback, traction, and orthosis, as well as acupuncture.

The recommendations and the strength of evidence in support of each treatment approach are noted in the table.

CHRONIC LOW BACK PAIN
Levels of Evidence
A=strong, B--moderate, C=limited or contradictory,
D--no evidence
(Van Tulder MW, Goossens M, Waddell G,
Nachemson A. 2000)

TREATMENT	OUTCOME	COMPAR-ISON GROUP	LEVEL OF EVIDENCE
NSAIDs	Limited pain relief	Placebo	Limited evidence(C)
NSAIDs	Pain relief	Different NSAIDs	No difference(A)
Muscle	Pain	Placebo	Limited

relaxants	intensity		evidence(C)
Anti-depressants	Pain, depression	Placebo	Not effective(B)
Epidural steroids	Back pain with root pain	Placebo	Conflicting evidence(C)
Epidural steroids	Back pain without root pain	Placebo	Not effective(B)
Back School	Back pain	Multiple	Limited evidence(C)
Biofeedback	Back pain	Multiple	Not effective(B)
Traction	Back pain	Placebo	Strong negative(A)
Orthosis	Back pain	Non support	Limited evidence (C)
Manual therapy	Pain relief	Placebo	Strong positive(A)
Manual therapy	Pain relief	Multiple	Moderate positive(B)
Manual therapy	Long term relief	Multiple	Limited evidence(C)
TENS	Back pain		Inconsistent (C)
Acupuncture	Back pain	Placebo	Inconsistent findings(D)
Chemonu-cleolysis	Back pain	Placebo	Strong positive (A)
Discectomy	Sciatica (carefully selected		Moderate positive(B)
Discectomy	Sciatica		No evidence(D)
Lumbar fusion	Degenerative discs		No evidence(D)
Lumbar	Spondylo-		Limited

fusion	listhesis		evidence(C)

The chapter on acute and subacute neck pain provides a summary and conclusion, which states that staying active or continuing or returning to usual activities, reduces pain and decreases the consequences of acute neck pain. Painkillers and/or cervical collars should only be used for a limited period to enable patients to perform physical activity. There was moderate evidence that mobilization techniques when combined with other techniques and modalities help to improve range of motion and reduce pain faster than no treatment. There was also moderate evidence that active exercises are more effective than passive treatments, such as massage, heat, traction, and stretching. It was felt that when manual therapy is used in combination with other active treatment modalities there was moderate evidence that some patient groups may benefit from mobilization techniques as part of an activation program. The table describes the levels of evidence outlined in this chapter.

ACUTE AND SUBACUTE NECK PAIN
Levels of Evidence
A=strong, B--moderate, C=limited or contradictory,
D=no evidence
(Harms-Rindahl K and Nachemson A, 2000)

Vapo-coolant spray	Neck Pain	Placebo	Insufficient evidence(C)
Laser therapy	Neck pain	Placebo	Insufficient evidence(C)
Infrared therapy	Osteo-arthrosis	Placebo	No evidence(C)
TENS	Neck pain	Placebo	No effect(C)
Acu-puncture	Neck pain		No evidence(C)

Traction equipment	Neck pain	No traction	Limited negative(C)
Cervical Orthosis	Whiplash	No collar	No effect(C)
Supervised excercises	Neck pain	Brochure	Positive effect(C)
Manual therapy + Exercise	Neck pain	Passive treatment	Positive effect(C)
Patient education	Neck pain		Limited evidence(C)
Drug therapy	Neck pain		Insufficient evidence(C)
Surgery	Neck pain		No studies(D)

Critical review of the treatment of cervicogenic headaches

The notion that headaches may originate from disorders of the cervical spine and can be relieved by treatments directed at the neck is gaining recognition amongst headache clinicians but is often neglected in the spine literature. We performed a systematic literature review and critical evaluation of the literature using three computerized medical database (Medline, *CINAHL*, Mantis) that were searched for the terms "cervicogenic" and "headache". This was published in The *Spine Journal* (1, 31-46, 2001). After cross-referencing we retrieved 164 unique citations. Prevalence estimates range from 0.4 to 2.5% of the general population to 15-20% of chronic headache patients. CGH affects patients with a mean age of 42.9 years, have a 4:1 female disposition, and tend to be chronic.

CGH seems unresponsive to common headache medication. Sinail, uncontrolled case series have reported moderate success with surgery, spinal manipulation and injections. Although the research is not conclusive for any

treatment method commonly recommended for cervicogenic headaches there are more randomized controlled trials and case series support the use of cervical manipulation than any other form of treatment.

An independent review of the literature and Evidence Report on "Behavioral and Physical Treatments for Tension-related and Cervicogenic Headaches" was recently carried out by the Duke University Evidence Based Practice Center. They reached the conclusion that spinal manipulation was associated with significant improvement in headaches outcomes in trials involving neck pain and/or neck dysfunction and headaches. They felt that adverse effects are uncommon with manipulation

The relative evidence in favor of different treatment approaches to cervicogenic headaches.

CERVICOGEN-IC HEADACHES
Clinical evidence in support of
different treatment approaches
(Haldeman S and Dagenais S. The Spine Journal 2001)

TREAT-MENT	# UNCON-TROLLED CASE SERIES	COHORT STUDIES	RANDOM-IZED CON-TROLLED CLINICAL TRIALS
Surgery	9 (1-56 patients)	None	None
Radio-frequency rhizotomy	5 (7-24 patients)	None	None
Spinal manipulation	10 (1-332 patients)	1 positive	4 all positive
Injections	8 (1-180 patients)	2 both negative	1 positive

TENS	2 (20-60 patients)	None	None
Miscellaneous	4 (1-5 patients)	None	None

TRIGON HEALTH CARE GUIDELINES AND CRITERIA FOR THE TREATMENT OF BACK AND NECK PAIN.

The process used to develop the Trigon Health Care Guidelines

I have reviewed information concerning the qualifications, and specialties of the members of the Trigon Provider Policy Committee and the Managed Cart Advisory Panel as well as excerpts from minutes of meetings of the latter. I have reviewed sections of the depositions of Dr Grinnan and Dr Colley. The following appear to be reasonable conclusions from these documents.

1. It appears that the Managed Care Advisory Panel was responsible for the development and approval of treatment guidelines for Trigon Healthcare. The panel of physicians who developed and approved the Guidelines do not appear to include specialists whose training and primary case load is the treatment of back and neck pain or cervicogenic headaches. It appears that osteopathic physicians, chiropractors, and physical therapists who treat a large section of the population with back and neck pain and are the primary clinicians who utilize such procedures as spinal manipulation were not included in this panel. It is also not clear that there are any individuals in this panel with experience and training in epidemiology and clinical methodology, or who have experience in developing guidelines for conditions that are associated with the spine and related disorders.

2. It is not evident that a systematic review of the medical and scientific literature was performed prior to developing the Trigon guidelines. There is a general consensus within the scientific medical community that systematic reviews of the scientific literature are a necessary and essential component in the development of evidence based treatment approaches and outcomes based recommendations. They are also only valid if they incorporate practitioners of all specialties that deal with the condition in question and that there be individuals with experience in methodology and epidemiology within the specialty to provide criteria to assess the scientific literature. This is necessary in order to ensure that the interpretation of this literature is consistent with clinical practice.

3. It is not evident from these records that the guidelines were developed using an established consensus methodology with active debate amongst the members of the panel. It is not evident that these guidelines were sent out to peer reviewers and consultants to ensure their accuracy. Furthermore, it is not evident that these guidelines were ever open to public review as is generally recommended.

The Trigon Health Care Guidelines relative to other established Guidelines.

I am in receipt of a report entitled "Managing Low Back Problems in Adults". This is described as a clinical practice guideline produced by Trigon Blue Cross/Blue Shield. There is a series of algorithms that look very similar to the AHCPR guidelines.

There is a marked discrepancy between the guidelines produced by the AHCPR and those produced by Trigon in the table noted under "Treatment at Initial Visit". Under point 1, it recommends nonprescription analgesic

medication, such as acetaminophen and NSAIDs. Under point 2, it suggests that a short trial of manipulation may be as effective as NSAIDs. This is clearly a deviation from the AHCPR guidelines, which suggested that manipulation could be used in place of medication or a shorter trial, if combined with NSAIDs. Under section 3, it recommends physical methods or exercises, but it is clear in the AHCPR guidelines that these treatment approaches are of very equivocal efficacy. The Trigon guidelines recommend heat or cold modalities, but in the AHCPR guidelines it suggested that these should only be used for home programs. The Trigon guidelines also recommend rest, whereas the AHCPR guidelines actually recommended against rest except in the presence of severe sciatica, and then for not more than two days. The Trigon guidelines also make no mention of manipulation as an option in patients with sciatica as noted in the AHCPR guidelines.

The Trigon guidelines made available to me provide no justification for this marked deviation in the recommended treatment approaches when compared to the AHCPR guidelines. Following the Trigon guidelines would lead to increasing costs of heath care by justifying rest, which is "known to prolong disability, and providing payments for heat and home modalities in an office, for which there is no justification. The failure to recommend manipulation as an initial treatment for acute low back pain would likely lead to increased symptomatology and prolonged disability.

Trigon policy on reimbursing manipulation.

I am in receipt of an office advisor document from Trigon dated July 1997. This document states, "It is Trigon's position that manipulation of more than two regions would rarely be evidence-based and/or medically necessary. Conclusive peer-reviewed evidence of manipulation efficacy is limited to lumbar spine procedures."

This is clearly in conflict with the current medical evidence and consensus guidelines, which suggest that manipulation is a reasonable approach to the treatment of neck pain, and there is at least as much or more evidence for the use of manipulation in neck pain than most other treatment approaches

It is also in conflict with current scientific evidence on the different treatment approaches to cervicogenic headaches where there is again reasonable evidence in support of manipulation or at least more than other treatment approaches.

It is also in conflict with current epidemiologic evidence that it is common for patients to suffer from pain in multiple regions at the same time. Patients with low back pain commonly have neck or thoracic pain that would require treatment of multiple areas of the spine.

The minutes of the Managed Care Advisory Panel of October 25, 1995 include a discussion of the guidelines to be approved by this panel. Dr Colley emphasized that they were referral guidelines. Despite this policy it appears that this committee elected to utilize the words "may" and "should" instead of "may refer" or/'should refer" in the guidelines. A point that became evident from the AHCPR guidelines was that manipulation was the only' treatment approach that required a family physician to make a referral

of a patient with uncomplicated low back pain. The failure to emphasize the word "refer" is therefore most likely to impact practitioners of' manipulation.

CONCLUSIONS

There is a strong need to develop and maintain guidelines for the treatment of back and neck pain which are based on an honest and systematic review of the medical literature in order to develop evidence based treatment approaches for back and neck pain.

When systematic reviews of the literature and consensus panels have been performed, the scientific literature clearly supports a primary role for manipulation in the treatment of low back pain,, and that the evidence for manipulation in the treatment of neck pain is equal to or better than almost all other treatment approaches.

The documents provided to me on the position of Trigon Health Care in the treatment of neck and back pain are clearly in conflict with the recommendations from .the most rigorous systematic reviews of the medical literature.

Signed,

/s/Scott Haldeman
Scott Haldeman

Date: 26 July, 2002

ENCLOSED YOU WILL FIND THE LIST REQUESTED OF DEPOS AND TRIALS FROM THE YEARS 2000 THRU 2002, THE YEAR 1999 WAS IN OUR OLD COMPUTER

2001

SYSTEM AND IS UNAVAILABLE.

2000

1623 GIVENS VS. LUCY	TRIAL	#49
1659 KENDP, SCK, SANDRA	TRIAL	#6
1655 SJOLIE VS. JILL	DEPO	#49
1290 CLAVEL, DANIEL	DEPO	#8
1654 JUSTER VS. MARIAN	DEPO	#49
1771 FORMAN VS.DIDOMENICO	DEPO	#49
0956 WALDSCHMIDT, GUY	DEPO	#8
1727 BOWLES VS. PETERSON,DC	DEPO	#49
2016 AVALOS, JUAN	DEPO	#8
1100 GRONER, RACHAEL	DEPO	#8
0326 SHAVER, TOMMIE	TRIAL	#6
2081 GLYNN, LEONOR	TRIAL	#49
1304 ILES, PAMELA	DEPO	#8
1466 ROMERO VS. BERGMAN	TRIAL	#49
1972 SMITH VS. BOARDMAN	DEPO	#49
0624 WHITE, DEBORAH	DEPO	#5
2396 POTTER, KIMBERLY	DEPO	#8
2127 PLATEROS, SATURNINO	TRIAL	#49
1576 NADA, HUSSIEN	DEPO	#8
2146 PEACOR, MICHAEL	DEPO	#8
1013 OSBORNE, STOOT	DEPO	#49
2621 FLORES VS. CONCENTRA	DEPO	#49
2657 TORINO VS. QUARTZ	TRIAL	#49
2456 PRINCE VS. AUBREY	DEPO	#8

2001

0360 SONENSHINE, JILL	DEPO	#8
1934 HERNANDEZ, EDWARD	DEPO	#8
1677 BURCH, CHILISTINE	DEPO	#8
2563 CHANTAKASORN, WARAWAT	DEPO	#8
3119 EDWARDS VS. AMER. FARM INS	DEPO	#49
2720 LEAKY, SHARON	DEPO	#8
3180 BRENNER VS. ROSS	DEPO/TRIAL	#49
3253 BENJAMIN VS. KAPLAN	DEPO	#49
0514 WAMHOFF, MELVIN	DEPO	#8
2505 LEON, DEBRA	DEPO	#8
2642 ZEEMAN, TROY	DEPO	#8
2746 CORBIN VS. DOONE-EVANS	DEPO	#49
2873 CASTRO VS. COX	DEPO	#49
0108 AMBRIZ, JOSE	DEPO	#5
3614 NESBITT, THOMAS	DEPO	#6
3295 WASHINGTON, ROSITA	DEPO	#8
2284 CASTILLO, REYNA	DEPO	#8
2358 GARCIA, SUSAN	DEPO	#8
3356 BLACKMORE VS. POWELL	DEPO	#49
0275 DESOTO, NOEL	DEPO	#8
3366 PEREZ, FRANCISCO	DEPO	#8
3367 WEINFELD, HELEN	DEPO	#8

2002

0222 GEIST, LINDA	DEPO	#8
3442 LEWIS VS. LAWYER	TRIAL	#49
3153 PARKER VS. CURTIS	TRIAL	#49
2916 YTURRALDE, MICHAEL	DEPO	#8
3494 PADILLA, CHRIS	DEPO	#8
3690 GRANARD, DEBRA	TRIAL	#6
1972 SMITH VS. BOARDMAN	TRIAL	#49
2797 GARCIA/GAJADHAR, RACHAEL	DEPO	#6

0294 HANNA, DAVID	DEPO	#5
3435 GAtLIBAY, CARMEN	DEPO	#8
2358 GARCIA, SUSAN	DEPO	#8

CURRICULUM VITAE

Scott Haldeman

Mailing Address: 1125 E. 17th Street, Suite W-127
Santa Ana, California 92701
Telephone (714) 547-9822
Fax (714) 547-0443
E-mail: HaldemanMD@aol.com

Date of Birth: June 23, 1943

Marital Status: Married
Wife: Joan
Sons: Reeve and Keatly

Revised 9/01

Scott Haldeman, M.D.Page

BASIC QUALIFICATIONS

Degrees

D.C.	Palmer College of" Chiropractic, 1964
B.Sc.	University of Pretoria, 1968 (Physiology, Physics)
M.Sc.	University of Pretoria, 1970 (Neurophysiology)
Ph.D.	University of British Columbia 1973 (Neurophysiology)
M.D.	University of British Columbia 1976

Licensure Examinations

Iowa State Basic Science Board of Examiners, 1964
Canadian National Chiropractic Board of Examiners, 1970
Board of Directors of Chiropractic, Ontario Drugless Practitioners Act 1970
National Board of Chiropractic Examiners (United States), 1978
Medical Council of Canada Examinations (L.M.C.C.), 1976
Federation of Licensing Examination Boards (FLEX) - (United States), 1976
National Board of Medical Examiners (United States), 1976

Specialty Qualifications

FCCS - [Fellow of College of Chiropractic Sciences (Canada), 1975
FRCP(C) - Fellow of the Royal College of Physicians (Canada), 1981
Certified - American Board of Psychiatry & Neurology, 1982
Diplomate - American Board of Electroencephalography and Neurophysiology, 1981
Diplomate - American Board of Clinical Neurophysiology, Inc., 1983
Diplomat -- American Board of Electrodiagnostic Medicine, 1982

Academic Positions

Laboratory Assistant, University of Pretoria, 1968-1969
Student Academic Assistant, University of British Columbia, 1970-1971
Lecturer, Canadian Memorial Chiropractic College, 1970
Special Academic Staff, Chiropractic Sciences Division, Canadian Memorial Chiropractic College, 1976-1979

President, Neurology Department, University of California, Irvine, 1977-1980
Assistant Adjunct Professor, Department of Neurology, University of California, Irvine, 1980-1981
Attending Physician, Long Beach Veterans Administration Medical Center, 1980-1981
Assistant Clinical Professor, Department of Neurology, University of California, Irvine, 1984 to 1990
Adjunct Professor, Research Department, Southern California University of Health Sciences (formerly known as Los Angeles Chiropractic College), 1985 to Present
Associate Clinical Professor, Department of Neurology, University of California, Irvine, 1991 to 1998
Clinical Professor, Department of Neurology, University of California, Irvine, 1998 to Present "

UNIVERSITY AND COLLEGE HONORS

Valedictorian, Class of January 1962, Palmer College
Pi Tau Delta, Honor Society, Palmer College, 1964
Captain of the Rugby Team (college letters), Palmer College, 1963
President, Student International Chiropractors Association, Palmer College, 1963
International Chiropractors Association Student Achievement Award, 1963
President, Palmer College Flying Club, 1962
B.Sc. distinction in physiology
M.Sc. with honors
South African Medical Research Council Overseas Study Bursary, 1972
Louis Lipsy Toohill Scholarship in Rheumatology, University of British Columbia, 1972, 1974, and 1975
The Northwest Association of Physical Medicine and Rehabilitation Award, 1975

The Vancouver General Hospital, Department of Psychiatry Attending Staff Prize, 1975
The British Columbia Anesthetists Society Prize, 1976
Dr. A.M. Agnew Memorial Scholarship for Obstetrics, University of British Columbia, 1976
Dr. Peter H. Spohn Memorial Prize for Gynecology, University of British Columbia, 1976
Outstanding Achievement by Volunteer Faculty, University of California, Department of Neurology, 1999

CHIROPRACTIC HONORS

Certificate of Merit, South African Chiropractors Association, 1967
Chiropractor of the Year, South African Chiropractors Association, 1968
Palmer College Alumni Award, 1968
Research Fellowship, Foundation of Chiropractic Education and Research, 1975
Doctor of Science degree (honorary), Western States Chiropractic College, 1981
Researcher of the Year Award, American Chiropractic Association, 1990
Chiropractor of the Year, Dynamic Chiropractic, 1991

CLINICAL EXPERIENCE

Private Practice, Chiropractic, 1964-1977
Internship, Medicine, June 1976-1977
Resident, Neurology, July 1977-June 1980
Fellow, Electrodiagnosis, Veterans Administration Medical Center, Long Beach, California, September 1980-August 1981
Private Practice, Neurology, January 1981-Present

HOSPITAL AFFILIATIONS

St. Joseph Hospital, Orange, California
University of California, Irvine Medical Center, Orange, California

PROFESSIONAL ORGANIZATIONS

American Academy of Neurology, 1977-Present
Orange County Medical Society, 1982-Present
California Medical Association, 1984-Present
American Medical Association, 1982-Present
International Society for the Study of the Lumbar Spine, 1979-Present
American Back Society, 1984-1994
North American Spine Society, 1984-Present
North American Academy of Manipulative Medicine, 1977-1995
Currently American Academy of Orthopedic Medicine
American Chiropractic Association, 1976 -Present
International Chiropractic Association 1971-1990
Federation International de Medecine Manuell, 1981-1993
National Back Research Foundation, 1981-1985
American Medical EEG Society, 1982-1994
Orange County Neurological Society, 1982-Present
American Association of Electrodiagnosis and Electromyography - Currently American Academy of Electrodiagnostic Medicine, 1982-Present
North American Cervicogenic Headache Society, 1996-present

Chiropractic Committees and Positions

Research Consultant, Canadian Chiropractic Association, 1973-1979

Research Consultant, American Chiropractic Association, 1975-I979
Research Consultant International Chiropractic Association, 1973-1982
Consultant, Foundation for the Advancement of Chiropractic Research, 1979
Consultant, Foundation for Chiropractic Education and Research, 1979
Executive Member, South African Chiropractors Association, 1965-1969
Founding Committee, South A/Rican Chiropractic research Foundation 1968-1969
Canadian Chiropractic Association Committee for a definition of Chiropractic, 1970
British Columbia Chiropractic Association, Public Relations Committee, 1971-1972
British Columbia Chiropractic Association, Committee to Investigate the Establishment of a Faculty of Chiropractic, 1974
"ICA Review," Technical Paper Review Committee, 1978-1979
American Chiropractic Association, Council of Neurology, 1974-1977
Canadian Chiropractic Association, Convention Organizing Committee, 1976
International Chiropractors Association, Conference Committee, 1979
Guidelines for Chiropractic Quality Assurance and Standards of Practice, Chairman, 1990-1992
World Federation of Chiropractic Research Council Chairman, 1990-present
National Workshop to Develop the Chiropractic Research Agenda Member of Planning Committee and participant, 1995-1996
College of Chiropractors Faculty of Neurology, Hon. President, 1999

Medical Committees and Position

Vancouver General Hospital Back Pain Special Interest Group, 1976-1977
North American Academy of Manipulative Medicine

- Counselor, 1975-1979
- Vice-President 1980
- President-Elect 1981
- President 1983
- Resident 3rd Vice-President 1986-1988

University of California, Irvine, Manipulation Research Committee, 1978
International Society for the Study of the Lumbar Spine

- Membership Committee 1980-1982
- Chairman 1982
- Executive Committee 1992-1994

Physical Medicine Research Foundation, International Multidisciplinary Board, National Back Foundation, Advisory Council, 1984
California Medical Association, Committee on Health Care, 1984-1986
American Back Society, Board of Directors, 1985-1994
North American Spine Society

- Executive Council 1984-1986
- Vice-President and President-Elect 1987
- President 1988-1989
- Parliamentarian 1989

Public Relations Committee 1991
Long Range Planning Committee 1992
Membership Committee 1992-present
Practice Guidelines 1996
Guidelines Committee 1997
Advisory Panel 1997
NASSNews Sub-Committee/Editorial Board 1997
Research Fund Management Committee 1999
Member, Combined Task Force of the North American

Spine Society, American Society of Spine Radiology, and American Society of Nueroradiology - Nomenclature and Classification of Lumbar Disc Pathology. Published in Spine, Vol. 26, No. 5, 2001

Orange County Neurological Society, President 1988-1989

American Academy of Neurology

- Liaison with North American Spine Society, 1989-1995
- Facilitator - Assessment: The Neurological Evaluation of Male Sexual Dysfunction. Report of the Therapeutics and Technology Assessment Subcommittee, 1993-1995
- Course Director: Recent changes in the treatment of back pain. AAN Annual Meeting, 1993, 1994, 1995

American Academy of Orthopedic Surgery

- Orthopedic Research Society. Panelist, Occupational Medical Science Study Group, 1995
- New Horizons in Low Back Pain. Workshop participant, 1995

Value Health Sciences. Panel member, "Laminectomy and Spinal Fusion," September 1992

American Board of Independent Medical Examiners. Examination Committee, 1995-1996

North American Cervicogenic Headache Society. Member, Scientific Board, 1996

Government Committees and Positions

National Institute of Neurological Diseases and Stroke Committee to Establish a Workshop on the Research Status of Spinal Manipulative Therapy, 1974-1975

State of California, Division of Industrial Accidents, Low Back Disability Schedule Committee, 1984-1987

State of California, Division of Industrial Accidents, Medical Bureau. Committee on Chiropractic Standards, 1985-1986

U.S. Department of Heath and Human Services, Agency for Heath Care Policy and Research. Panel member - "Clinical

Practice Guidelines on Acute Low Back Problems in Adults," 1994
Member of Spine Specialist Panel, Commission on Peace Officer Standards and Training, State of California, 1992
Independent Medical Examiner, State of California, Department of Industrial Relations, 1983 to Present
Qualified Medical Examiner, State of California, Department of Industrial Relations, 1991 - present
Consultant, Birch & Davis, U.S. Department of Defense, Chiropractic Demonstration Project, 1995 - present
Agency for Health Care Policy and Research. Peer Reviewer, "Headache Evident Report Project," 1997

Editorial Boards

Journal of Manipulative and Physiological Therapeutics, Editorial Board, 1979 - Present
North American Academy of Manipulative Medicine Newsletter, Editor, 1980-1982
Australian Chiropractic Association, Editorial Board, 1983 - Present
Journal of the Canadian Chiropractic Association, Editorial Board, 1985 - Present
International Chiropractic Association, Editorial Advisory Board, 1983
National Back Foundation, Advisory Council, 1984
Manual Medicine, Editorial Board, 1984-1992
Neuro-Orthopedics. Editorial Board, 1986-1995
Spine, Associate Editor, 1988-Present
The Back Letter, Editorial Board, 1992-1994
Rodale Press, Book Division Board of Advisors, 1992-Present
Spine Letter, Editorial Board, 1994-Present
Journal of the Neuromusculoskeletal System, Editor in Chief, 1992-Present
Injury Data Corporation Newsletter, Founding Medical Advisory Board, 1996

INVITED LECTURES

1985

Lumbar Spine Seminar, sponsored by St. Joseph Hospital, Orange, California, February 9. "'Manipulative Therapy"; "Flexion vs. Extension Exercises."

Back Pain Symposium, sponsored by British Columbia Chiropractic Association, March 15 - 16. "Spinal Pain Syndrome"; "An Overview of Trials of Manipulation"; "Neuropsychological Models"; "Concluding Remarks."

Western States Chiropractic College's Homecoming '85, sponsored by Western States Chiropractic College, Portland, Oregon~ May 3 - 5. "Cervical Spine Pain Syndrome - Diagnosis and Treatment."

San Bernandino County Medical Center Meeting, sponsored by Syntex Speaker's Bureau San Bernadino, California, May 30. "Low Back Pain."

Fourth International Conference on Low Back Pain, sponsored by Canadian Memorial College, Toronto, Canada, June 1 - 2. "Clinical Evaluation of Neurovisceral Function."

Joint Orange County Workers' Compensation Carriers and Defense Counsel Association, sponsored by JOCWCCDCA, Santa Ana California June 27. Guest speaker. "Low Back Pain: A Real Pathology or a Donor's Bonanza."

Second Annual Meeting, sponsored by North American Lumbar Spine Association Laguna Niguel, California July 24 - 27. Session Chairman on Clinical Neurophysiology. "The Comprehensive Evaluation of Lumbar Neurological Lesions

Utilizing EMG, H-Reflexes, F-Responses, SEPs, BCK, Cystometry, and Colonometry."

Summer Convention and Educational Symposium, sponsored by Washington Chiropractors Association, Coeur d' Alene, Idaho, August 16 - 18. "Neurology and Chiropractic."

Seventh Annual Challenge of the Lumbar Spine '85, sponsored by Abbott Northwestern Hospital and its Rehabilitation Division, the Sister Kenny Institute, Minneapolis, Minnesota, September 19 - 21. "Thermography for Musculoskeletal Disorders: Real or Pip-off?" Moderator on low back pain.

Pain and Ethics in the Emergency Department, sponsored by Cedars-Sinai Medical Center, Department of Emergency Medicine, Los Angeles, California, September 27. "Low Back Pain."

Symposium on Back Pain, sponsored by the American Back Society, San Francisco, California October 4. "'Conservative Treatment of Spinal Pain"; Electrodiagnostic Evaluation of Spinal Disorders"; "Spinal Manipulation."

First International Congress, Back Pain: Current Concepts and Recent Advances, Vienna, Australia November 3 - 8. "Clinical Neuroanatomy of the Spine"; "What are the Objectives of Conservative Treatment?"

1986

Ninth Annual Conference on Evoked Potential and Advances in Electroencephalography, sponsored by UCI Department of Neurology, L-vine, California, January 24 - 26. "Pudendal evoked Responses - Techniques and Applications."

Symposium on Back Pain, sponsored by the American Back Society, Anaheim California, May 9 - 10. "Manipulation of the Spine."

Seventh Annual AOA International Symposium: Frontiers in Low Back Pain, sponsored by American Orthopedic Association Chicago, Illinois, August 17 - 22. "Electrodiagnosis of Spinal Neurologic Lesions"; "Spinal Manipulative Treatment."

Annual Conference 1986, sponsored by Association for Holistic Health San Francisco, California, August 29 - September Modern Treatment of Back Disorders."

Low Back Pain: A Multidisciplinary Approach, sponsored by Workers' Compensation Board of British Columbia, Vancouver, B.C., October 2 - 4. "The Circuitry of Pain"; "The Role of Manipulation"; "EMGs: Are They Helpful?"

Occupational Low Back Pain Course, sponsored by University of Utah, Snowbird, Utah, October 6 - 8. "Electrodiagnostic Studies"; "Manipulation."

The Challenge of the Lumbar Spine '86, sponsored by St. Mary's Hospital and Medical Center, St. Mary's Spine Center, San Francisco, California, November 6 - 9. "Problems facing the Spine Specialist as Viewed by the Neurologist"; "Over-treatment as Viewed by the Neurologist"; Moderator on topic: Electrodiagnosis and Thermography. Chairman of Thermography Panel.

Fall Symposium on Back Pain, sponsored by American Back Society, San Francisco, California, December 4 - 6. "'Spinal Manipulative Therapy and Sports Medicine."

1987

Spring Symposium on Back Pain sponsored by the American Back Society, Anaheim, California, April 29 - May 2. Position: Member of the Board of Directors. "Electrodiagnostic Studies: Indications and Techniques"; "Short-term Trial of Chiropractic Adjustments for the Relief of Chronic Low Back *Pain*."

North American Spine Society, Second Annual Meeting, sponsored by NASS, Banff Alberta, Canada, June 25 - 28. "'The Correlation Between CT Scanning, Electrodiagnostic Studies, and Clinical Findings in Workers' Compensation Patients with Back and Leg Pain."

Bisbane Spinal Study Group, Brisbane, Australia, August 21 - 23.

Role of Manipulation in Sports Medicine, sponsored by North American Academy of Manipulative Medicine, Las Vegas, Nevada, October 28 - 31. "'The Role of Manipulation in Sports Medicine."

1988

Industrial Musculoskeletal Health: Sports Medicine for Working People, sponsored by Division of Orthopedic Surgery, Southwestern Medical School, the University of Text, Southwestern Medical Center, Dallas, Texas, September 15 - 17. "Selecting Among Manipulation and Other *Modalities*"; "Office Management of Disabled Workers"; "Workman's Compensation: The California System of Evaluating Permanent and Partial Impairment."

Low Back Pain - A Changing Paradigm, sponsored by Physical Medical Research Foundation, Ontario, Canada, September 30 - October 2. "The Objectives of Conservative Management of Low Back Pain."

Occupational Low Back Pain Conference, sponsored by Rehabilitation Engineering Center, Department of Orthopedics and Rehabilitation, University of Vermont College of Medicine, Hilton Head, South Carolina, October 16 - 19. "Disability Ratings"; "Electrodiagnostic Studies"; Manipulation: Theory, Practice, and Utilization."

The Challenge of the Lumbar Spine '88, sponsored by The Arthritis Foundation, San Antonio, Texas, November 9 - 13. "'Non-specific Low Back Pain Syndrome - What is it? Why does it "happen?"

Fall Symposium on Back Pain, sponsored by American Back Society, San Francisco, California, December I - 3. "Clinical Spinal Neural Anatomy and Neurophysiology."

Second International Interdisciplinary Chiropractic Seminar, sponsored by Sociedad Cientrifico Quiropractica de Mexico, Mexico City, Mexico, February 16 - 19.

The 118th Annual Session and Western Scientific Assembly, sponsored by California Medical Association Anaheim, California, March 3 - 8. "Conservative Treatment: Objectives, Choices, Results."

Invited Lecture Series, sponsored by Palmer College of Chiropractic Graduate School, UCI, April 1 ~. "Current and Future Clinical Research Status of the Chiropractic Adjustment."

Spring Symposium on Back Pain, sponsored by American Back Society, Cambridge, Massachusetts, April 13 - 15. "Differentiation of Acute and Chronic Back Pain."

The 9th Annual Conference on Evoked Potentials, sponsored by the American Society for Clinical Evoked Potentials, San Francisco, California, May 3 - 6. "Evaluation of Bowel, Bladder, and Sexual Disturbances by Electrophysiologic Methods"; "Evoked Responses in Clinical Neuro-Urology"; "Pudendal Nerve Evoked Spinal, Cortical, and Bulbocavemosus Reflex Responses: Methods and Applications"; "The Neurovisceral and Electrodiagnosis Evaluation of Patients with Thoracic Spinal Cord Injury."

The First Annual Multidisciplinary Symposium - Cervical Spine '89, sponsored by New York Chiropractic College, New York, September 12- 16. Position: Master of Ceremonies. "Defining Spinal Manipulation"; "Complications of Cervical Manipulation."

XVIIth ILAR Congress of Rheumatology, sponsored by ILAR, Rio de Janeiro, Brazil September 17 - 23. "Physiotherapy and Manipulation in the Management of Back Pain."

Congresso Intenacional Sobre Coluna Vertebral, sponsored by Centro Brasilero de Estudos de Coluna Vertebral Sao Paolo, September 24 - 26. "Physiotherapy and Manipulation in the Management of "Back Pain"; "Defining Spinal Manipulation."

Tenth Annual National Occupational Low Back Pain Conference, sponsored by UCI Department of Neurology, Long Beach, California, October 18 - 21. "Acute versus Chronic Pain"; "Electrodiagnosis"; Manipulation - Indications and Limitation"; "Rating Systems - Principles and Problems."

Perspectives on Pain - Low Back Pain: Mechanisms and Management. Sponsored by Challenge of' the Lumbar Spine, San Francisco, California, November 2 - 5. Differential Diagnosis of Low Back Pain"; "Social and Legal Aspects."

Fall Symposium on Back Pain, sponsored by the American Back Society, Las Vega, Nevada, November 30 - December 2. "Complications of Cervical Spine Manipulation."

1990

Thirteenth Annual Evoked Potential and Electrodiagnostic Workshop, sponsored by UCI Department of' Neurology, Irvine, California, February 2 - 4. "Bladder and Genital SEPs."

Advanced Seminar, sponsored by Motion Palpation Institute, Maui, Hawaii, February 25 - March 3. "Malpractice Suits: reducing Frequency and Increasing Dependability"; "Research: Beneficial Response to Chiropractic"; "Relationship: Spinal Pathology, Patient Symptoms"; "Conservative Treatment and Approaches."

Back Pain in the Nineties: New Solutions to Old Problems, sponsored by University of Colorado Health Sciences Center, Denver, Colorado, Ms, oh 16 - 17. "Scope of Back P~ Problems."

Primary Care and Diagnosis for the Chiropractic Profession sponsored by Orange County Chiropractic Association, Santa Ana, California, April 1 Position Guest Speaker

Bright Horizons for Chiropractic, sponsored by the American Chiropractic Association, Anchorage, Alaska, June 6-9. "Chiropractic Philosophy: The Relevance in the 90s."

Homecoming VI, "A Decade of Growth & Vision,' sponsored by Palmer College of Chiropractic West, San Jose, California, October 18-21. "Failure of the Medical Pathology Model to Explain Back Pain.:

Eleventh Annual Low Back Pan Conference, sponsored by University of Michigan Center for Occupational Health and Safety Engineering, Ann Abor, Michigan, October 29-30. "Acute and Chronic Low Back Pain"; "Impairment Rating Systems."

The Many Faces of Pain conference sponsored by the North American Academy of Musculoskeletal Medicine, Tucson, Arizona, November 8-10. "The Failure of the Pathological Model to Explain the Presence of Back Pain"; "Advanced Seminar"; "Assessment of Craniocervical Dysfunction and Risk Factors for Chronic Pain: A Neurologist's View of the Role of Manual Medicine."

Fall Symposium on Back Pain, sponsored by the Americaa Back Society, San Francisco, California, December 6 - 9. Course Chairman/Moderator.

1991

Neurology and Neurosurgery Review Courses, sponsored by Osler Institute, Los Angeles, California, January 6 - 12. "Electrodiagnosis of Spinal Disorders"; "Low Back Pain." -

Fifty-eighth Annual Meeting, American Academy of Orthopedic Surgeons, Anaheim, California March 7 - 12. "Indications and Results of' Manipulative Treatment for Low Back Pain."

Medical Coordination of Workers' Compensation Claims Class, sponsored by Reliance Insurance Company, March 25. "Diagnostic testing and pain management."

Spring Symposium on Back Pain, sponsored by the American Back Society, Toronto, Canada,
May 1 - 5. Course Director, Clinic Faculty. "The Clinical Evaluation of Patients with Neurovisceral Disorders."

World Chiropractic Congress 1991, sponsored by World Federation of Chiropractic, Toronto, Canada, May 4 - 5. Course chairman. "The Evolution and Importance of Spinal and Chiropractic research."

Back Pain Current Concepts and Advances, 4th International Congress, sponsored by International Back Pain Society, Sydney, Australia, June 6 - 9. "The Neurophysiological Bas{s of Back Pain"; "Neurophysiological Assessment'; "Manipulation."

Occupational Spinal Disorders: Prevention, Diagnosis & Treatment, sponsored by University of Vermont, College of Medicine, Chicago, Illinois, September 22 - 24. "Pain"; "Conservative Treatment Options"; "California Approaches to Disability Evaluation."

Fourth International Symposium, Physical Medicine Research Foundation, Toronto, Canada, September 27 - 29 Manipulation"; Failure of the Pathology Model to Predict Back Pain."

Report Writing Seminar, sponsored by Workers' Compensation Advisor and Stress Management Advisor, Los Angeles, California, October 19. "Apportionment in Physical Disabilities."

Fall Symposium on Back Pain, sponsored by American Back Society, San Francisco, California, December 11 - 15. "Current Status of Functional and Palpatory Diagnosis."

1992

Occupational Ergonomics: Work Evaluation and Prevention of Upper Limb and Back Disorders, sponsored by Workers' Evaluation and Rehabilitation Center Department of Occupational Therapy, Loma Linda University, San Diego, California, February 24. "Failure of the Pathology Model to Explain Low Back Pain'; "Conservative Management of Low Back Pain."

Adjustment and Manipulation for Spinal Pain sponsored by British Columbia College of Chiropractic, Vancouver, B.C., February 27 - March 1. "Failure of the Pathology Model ~o Explain Spinal Pain"; "Practical Applications of Spinal Pain Physiology"; "Acute vs. Chronic Pain."

Annual Session and Western Scientific Assembly, sponsored by California Medical Association~ Anaheim, California, March 13 - 18. "The Role of Chiropractic Manipulation"; "The Role of Electrical Studies in Evaluation of Surgical Candidates."

Clinical Seminars in Sports Medicine, sponsored by Tarzana Regional Medical Center, Orthopedic Consultants Medical Group, and Cummings and G-Gillette Physical Therapy, Northridge, California, March 21. "Evaluation of Indications and Effectiveness of Spinal Manipulation."

National Football League Physicians Society Conference, sponsored by National Football League Physicians Society, San Francisco, California, April 3 - 5. "'The Rote of Manipulation and Mobilization."

Canadian Chiropractic Association Convention '92, Regina, Saskatchewan, May 27 - 3 I. "Neurologic Assessment"; "Looking to the Twenty-First Century."

Fifth International Conference, sponsored by International Federation of Orthopaedic Manipulative Therapists, Vail, Colorado, June I - 5. "Chiropractic Research - Past and Present"; "Chiropractic - Let's Cooperate."

Seventh Annual Meeting, sponsored by North American Spine Society, Boston, Massachusetts, July 9 - 11. Moderator of session on Neurophysiology and Electrodiagnostics.

Occupational Spinal Disorders: Primary, Secondary, and Tertiary Care and Prevention, sponsored by Pride Research Foundation, University of Vermont, Dallas, Texas, October 1 - 3. Moderator on topic of Basic Science: "Classification and Diagnostic Tests for Back Pain"; "Structural Diagnostic Tests"; "Physics/Therapy and Chiropractic Approaches to Secondary Prevention"; "Alternative Systems for Disability Evaluation."

Palmer College Graduating Class Commencement Address, Davenport, Iowa, October Position: Keynote Speaker.

The Industrial Back, sponsored by the American Back Society, San Francisco, California, December 9-13. Moderator: "Taking an Effective Work Injury History."

1993

Occupational Ergonomics, February 22, San Diego, California Failure of Pathology to Explain Low Back Pain" and "Conservative Management of' Low Back Pain."

Los Angeles College of Chiropractic 6th Annual Interdisciplinary Symposium - "Neurobiological Mechanisms of Spinal Manipulation." March 6, Whittier, California.

Orange County Chiropractic Society, March 9, Costa Mesa, California. "The Electrodiagnostic Evaluation of Spinal Disorders."

Chang Zheng Hospital, The Second Military Medical University of China, Shanghai Tang Du Hospital, The fourth Military Medical University of China, Xian The Third Military Hospital, Beijing Medical University, Beijing, China. "Back Pain."

American Academy of Neurology Annual Meeting, April 25, New York City. Course Chairman. Recent Advances on the Evaluation and Treatment of Back Pain."

San Francisco Spine Institute, April 30, San Francisco, California. '~NASS Nomenclature/Chiropractic Language: Lets Call It What It Is" and Electrodiagnostics: When Are EMG, NCV, SSEP Useful?"

Occupational Spinal Disorders, October 4 - 5, Pittsburgh% Pennsylvania. "The Anatomy and Physiology of Back Pain: What Do We know?"

South Africa International Chiropractic Congress, October 10 - 15, Sun City,. South Africa- "'Failure of the Pathology Model to Explain Back Pain"; "Research Supporting the Efficacy of Chiropractic Manipulative Procedures."

1994

University of California, Irvine, February 11 - 13, Newport Beach, California. Course Chairman. "The Neurologist and Back Pain: Musculoskeletal Diagnosis and Management."

Occupational Ergonomics, February 23, San Diego, California- "Failure of Pathology to Explain Low Back Pain" and "Conservative Management of Low Back Pain."

California Medical Association, March 18, March 20, Anaheim, California. Course on Practical Neurology: The Old, and The New and Promising. "Multiple Views of Pain Management."

American Academy of Neurology, May 6, Washington, D.C. Course Chairman. "Recent Advances in the Evaluation and Treatment of Back Pain."

Occupational Spinal Disorders, September 25 - 26, Atlanta, Georgia. "Spinal Manipulation: The Legitimization of a Treatment Procedure."

American Back Society, November 30 - December 2, Los Angeles, California. "Guidelines for Managed Care of Low Back Pain" and "Myths Concerning Strokes Following Cervical Manipulation."

1995

Council on Chiropractic Education Convocation, New Orleans, Louisiana January 27. "The Role of Chiropractic in an Integrated Health Care System."

Occupational Ergonomics: Work Evaluation and Prevention of Upper Limb and Back Disorders, sponsored by the University of Michigan, American Industrial Hygiene Association, San Diego Local Section, State Compensation Insurance Fund of California; San Diego, California, February 20 - 23. "Failure of the Pathology Model to Explain Low Back Pain"; "Conservative Management of Low Back Pain."

Netherlands Manual Therapy Association Conference, sponsored by NV[illegible], conducted via video at View Tech, Inc., Irvine, Califo[illegible]a, April 28. Topic: Lumbar and cervical spine.

Forty-seventh Annual Meeting, American Academy of Neurology, Seattle, May 6 - 13. Course Director. Topic: Recent Advances in the Treatment of Back Pain.

Texas Medical. Association Spring Program, sponsored by University of Texas MID Anderson Cancer Center, Dallas, Texas, May 11 - 20. "Spinal Manipulation for Low Back Pain."

International Workers' Compensation Foundation Forum VII, sponsored by IABC, Newport Beach, California, May 23. "The Legitimization of a Treatment Procedure."

International Society for the Study of the Lumbar Spine 22nd Annual Meeting, Helsinki, Finland, June l8 - 22. "The correlation 0f palpable muscle spasm, pain, and activity scores and cerebral potentials evoked by the magnetic stimulation of paraspinal musclea." Session Chairman.

Chiropractic Centennial Foundation Convention, sponsored by World Federation of Chiropractic, Washington, D.C., July 5 - 7. Co-Chair, Academic Program. "One Hundred Years of Chiropractic Research."

Sixteenth Annual Occupational Spinal Disorders Conference, sponsored by Canadian Back Institute Toronto, Canada, September 10 - 11. 'X-low to Prescribe Optimal Manipulative Therapy"; "X-low to Handle the Legal Implications of Aggressive Therapy."

Chiropractic Centennial Foundation Celebration, sponsored by World Federation of Chiropractic, Davenport, Iowa, September 14 - 16. "One Hundred years of Chiropractic Research." Workshop on spinal neurophysiology and somatovisceral reflexes.

Chiropractic Centennial Celebration, sponsored by Doctors of Chiropractic Liaison Council, Tokyo, Japan, November 18 - 19. "One Hundred Years of Chiropractic Research"; "Neurophysiological theories on which chiropractic in based"; "The clinical research which has established chiropractic as an accepted health care profession."

1996

Defending the Personal Injury Lawsuit sponsored by State Farm Mutual Insurance Company, Los Angeles, California, February 24. "Spinal Manipulation and Chiropractic Treatment for Spinal Pain Syndromes."

Occupational Ergonomics: Work Evaluation and Prevention of Upper Limb and Back Disorders, sponsored by University of Michigan and State Compensation Insurance, San Diego, California, February 28. "'Failure of Pathology to Explain Low Back Pain"; "Conservative Management of Low Back Pain."

The Puzzling Relationship of Vertigo and Cervical Spine, sponsored by the European Chiropractors' Union, Geneva, Switzerland, May 16 - 18. "Incidence, Risk Factors, and Mechanisms of Vertebral Basilar Artery Ischemia Following Cervical Manipulation"; "A Critical Analysis of Vertiginous Symptoms in the Prance of Chiropractic."

Palmer College of Chiropractic West, graduation ceremony, Santa Clara, California, June 14. Commencement Address: "Chiropractic is an Accepted Profession: What Do I Do Now?"

Recent Advances in the Treatment of Low Back Pain, 11th ISSLS Instructional Course sponsored by Hospital for Joint Diseases, New York City, June 22. "Indications for Clinical Neurophysiological Testing"; "Spinal Manipulation: When? How? Who?"

SPINE Combined Grand Rounds, sponsored by the University of New York, Syracuse, Department of Physical Medicine and Research, June 24. "The Failure of Pathological Model to Explain Back Pain and its Consequence in Guideline Development."

Chiropractic Managed Care: Developing Successful Integration Strategies, sponsored by the National Managed Health Care Congress, Coronado, California, July 23, "A New Proposal for Standardizing Health Care Providers"

17th Annual Occupational Spinal Disorders Conference: Return to Work with Pain; Crossing the Barrier, sponsored by Canadian Back Institute, Calgary, Alberta, Canada, September 15 - 16. "'Chiropractic: The second 100 years"; Session: The Barrier of Research. Topic: "why should we look?"

Diagnosis & Treatment of' Back Pain - The Next Level, sponsored by American Back Society and Saint Mary's Spine Center, San Francisco, California, December 12 - 14. "Credentialing of health care providers to qualify for managed care referral panels - including compliance with minimum standards and specific treatment protocols"; "Legitimization of manipulation - for who and how will you provide this treatment."

1997

Clinical Neurology in Chiropractic Practice, in Patients' Interest ~ sponsored by the international College of Australia Ltd. and Chiropractors Association of Australia, Sydney and Brisbane, Australia, February 15 - 16. Course lecturer on the clinical aspects of neurophysiology

1997 World Chiropractic Congress, sponsored by World Federation of Chiropractic, The Chiropractic Council of Japan The World Heath Organization Tokyo, Course chairman. "Cerebrovascular complications of manipulation - Our current level of understanding"; "The future of research into the role of manipulation in the treatment of the cervical spine.

American Academy of Pain Management 8th Annual Clinical Meeting, Las Vegas, Nevada, September 18. Workshop topic: "Lower back pain: Finding common ground - Chiropractic Perspective."

American Association of Electrodianostic Medicine 44th Annual Scientific Meetin, 20th Annual Courses and Workshops, San Diego, California, September 18. Special Interst Group Session topic: "Electrophysiologic studies in bowel and bladder problems and sexual dysfunction."

NCMIC 1997 Defense Counsel Seminar, presented by National Chiropractic Mutual Insurance Company, Chicago, Illinois, October 3 - 4. Lecture topic: "A new look at stroke: The facts of an exhaustive study."

Alternatives in Patient Care, conference sponsored by the College of Physicians of Columbia University and Oxford Health Plans, New York City, October 22. Presentation: "Chiropractic: Clinical Effectiveness and Contraindications."

The Diagnosis and Treatment of Neck and Back Pain - The integrative Approach, sponsored by American Back Society and Stanford University, San Francisco, California, December 10 -13. "Evidence that muscles play a role in back pain."

1998

Occupational Ergonomics: Work Evaluation and Prevention of Upper Limb and Back Disorders, sponsored by University of Michigan, American Industrial Hygiene Association (San Diego Local Section), and State Compensation Insurance Fund, San Diego, California, February 4. Presentations: "Failure of Pathology to Explain Low Back Pain", "Conservative Management of Low Back Pain."

Seventh Annual Workers' Compensation and Occupational Medicine Seminar, sponsored by SEAK, Inc., and The American College of Occupational and Environmental Medicine, San Francisco, California, March 11. Presentations: "Spinal Manipulation: Scientific Update," "Low Back Pain Risk Factors

Hospital for Joint Diseases Spine Center symposium: Management of Recalcitrant Back Disorders, sponsored by New York Chiropractic College, New York, New York, April 4. Presentations: "History and Physical: Red Hags," "International advances in chiropractic."

1998 California Chiropractic Association Convention, Clinical Concepts Workshops and Tug-of-War II, The Great Debate. San Diego, California, June 27.

North American Spine Society 13th Annual Meeting. Presentation: "Sixty-four cases of CVAs following cervical spine manipulative therapy." Symposium: "'Non-surgical Back Pain Management." San Francisco, California, October 30.

Canadian Heritage Conference, 1st Scientific Chiropractic Symposium, sponsored by the University of Calgary. Lecture: "The Evolution of Chiropractic Research: A Personal Perspective." Calgary, Alberta, November 15.

Palmer College of Chiropractic West, commencement speech at the graduation ceremony. "'The Search for a Post-Graduate Mentor." San Jose, California, December 11.

1999

Alternative Medicine: Implications for Clinical Practice and State-of-the-Science Symposia, sponsored by Harvard Medical School, Department of Continuing Education. Lecture: "Chiropractic." Boston, Massachusetts, February 28 - March 2.

Occupational Ergonomics: Work Evaluation and Prevention of Upper Limb and Back Disorders, sponsored by University of Michigan Center for Occupational Health and Safety Engineering and by American College of Occupational and Environmental Medicine. Lectures: "Failure of Pathology to Explain Low Back Pain, Conservative Management of Low Back Pain." San Diego, California, March I7.

World Federation of Chiropractic 5th WFC Congress and Conference. Lecture: "The Neurological Effects of the Adjustment." Auckland, New Zealand, May 20 - 22.

Advanced Diagnosis and Treatment of Neck and Back Pain: The Integrated Approach. Sponsored by American Back Society and St. Mary's Regional Medical Center. Lecture; "A Century of Progress in Spinal Care." Las Vegas, Nevada, December 9.

2000

Occupational Ergonomics: Work Evaluation and Prevention of Upper Limb and Back Disorders. Sponsored by University of' Michigan. Lecture: "Failure of Pathology to Explain Low Back Pain" and "Conservative Management of Low Back Pain." Los Angeles, California, March 1.

Complementary and Alternative Medicine symposia. Sponsored by Harvard Medical School, Department of Continuing Education. Lecture: "Chiropractic." Boston, Massachusetts, March 12.

Anglo-European College of Chiropractic/British Chiropractic Association Joint Conference. Lecture: "What is the relationship between spinal pain, disability, and pathology?" "Cervicogenic headaches - what is our current level of understanding?" "Research and interprofessional cooperation as the basis for future understanding of neck pain." Bournemouth, England, March

Canadian Memorial Chiropractic College, 55th Convocation Speech: "The importance of a mentor in maximizing the opportunities of a graduating chiropractor." Toronto, Canada, May 5.

Osteopathic Physicians and Surgeons of California 8th Annual Seminar. Guest speaker. Dana Point, California, June 2.

Michigan State University, College of Osteopathic Medicine. Patenge Distinguished Lecturer. "Evolution of manipulation research." Lansing, Michigan, July 20.

International Conference on Spinal Manipulation sponsored by Foundation for Chiropractic Education and Research, Minnesota Chiropractic Association, and Northwestern College of Chiropractic. Keynote presentation: "Strengths and weaknesses of current chiropractic neurological theories." Bloomington, Michigan, September 23.

Defense Counsel Seminar, presented by NCMIC Insurance Company. Presentation: "CVA: A clinical analysis." San Antonio, Texas, October 6.

Advanced Diagnosis and Treatment for Neck and Back Pain 2000, sponsored by American Back Society and Allegheny General Hospital. Lecture: "Differential diagnosis of back pain - has it changed?" Vancouver, B.C., December 7.

2001

Chiropractic Neurology Seminar', sponsored by the Israel Chiropractic Association. Topics of discussion: Current status of neurologic theories of chiropractic; Differential diagnosis of patients with spinal pain; Modern models to explain spinal pain~ Cervicogenic headaches; Grand rounds/presentation of cases. Lecture: "'Chiropractic and Spinal Manipulation. Integration into Modern Health Care." Workshop: "The neurological examination in the chiropractic office." Aviv, Israel, January I7 and 19.

Harvard Complimentary and Integrative Medicine Symposium, Harvard Medical School Department of Continuing Education. Lecture: "Chiropractic. Clinical Practice and State of the Science." Boston Massachusetts, February 11.

American Academy of Orthopedic Surgeons 68th Annual Meeting Scientific Program. Symposium: "Complementary and Alternative Medicine (CAM) and the Orthopedic Surgeon." San Francisco, California, February 28.

Occupational Ergonomics: Work Evaluation and Prevention of Upper Limb and Back Disorders. Sponsored by University of Michigan. Lecture: "Failure of pathology to explain low back pain." "Conservative management of low back pain." Los Angeles, California, Matte 12.

World Federation of Chiropractic 6th Biennial Congress. Lecture: "The role of" chiropractic in the management of neck pain back pain, and headaches." Workshop: "The basic neurological examination" Paris, France, May 25.

BIBLIOGRAPHY

Scott Haldeman, M.D.

THESES AND BOOKS

1. Haldeman, S: Changes in the structure and function of sciatic nerve caused by constriction. M.Sc. thesis (Physiology). Faculty, of Mathematics and Natural Sciences, University of Pretoria South Africa, November, 1969.

2. Haldeman S: "Evidence in Favor of Glutamate as a Mediator of Synaptic Transmission." Ph.D. Thesis, Department of Physiology, University of British Columbia, Vancouver, B.C., Canada, January, 1973.

3. Haldeman S (editor): Modern Developments in the Principles and Practice of Chiropractic Appleton-Century Crofts, New York 1980.

4. LeCorre, F, Haldeman S: La Chiropraxie (French) 1986. Presses Universitaires Paris, 1986.

5. Haldeman, S (editor): Principles and Practice of Chiropractic. Appleton & Lange, Connecticut, 1992.

6. Haldeman, S (guest editor): Neurologic Clinics. Lower Back Pain Volume 17, Number 1. W.B. Saunders Company, Philadelphia, 1999.

ARTICLES AND BOOK CHAPTERS

1. Haldeman, S: "The First Impressions of the Synchro-Therme as a Skin Temperature Reading Instrument." J. Can. Chiropr. Assn. 14 (1): 7, 8, 22, 1970.

2. Haldeman, S: "Observations Made Under Test Conditions with the Synchro-Therme." J. Can. Chiropr. Assn. 14 (3): 9-12, 1970.

3. Haldeman, S, Hartwick, WG: "Chiropractic in British Columbia and its Relationship to Industrial First Aid." The Industrial First Aid Attendant 30 #6, 1971.

4. Haldeman S, Drum, D: "The Compression Subluxation." J. Clin. Chiropr. Arch. I: 10-21, 1971.

5. Haideman, S, Hammerich, K: "The Evolution of Neurology and the Concept of Chiropractic." J Can. Chiropr Assn. 15 4: 20-25, 1971.

6. Haldeman, S: "The Interactions Between the Somatic and Visceral Nervous Systems." Am. Chiropr. Assn. J. 5: 57-64, 1971.

7. Haldeman, S. Meyer, BJ: "The Effect of Constriction on the Conduction of the Action Potential in the Sciatic Nerve." S. Afr. Med. J 44: 902-906, 1370. Abstracted: Yearbook of Neurology and Neurosurgery, 1972.

8. Haldeman, S, Meyer, BJ: "The Effect of Experimental Constriction of the Structures of the Sciatic Nerve." S. Afr. Med. J. 44: 888-892, 1970. Abstracted: Yearbook of Neurology and Neurosurgery, 1972.

9. Haldeman, S, Huffman, RD, Marshall, KC, McLennan, H: "The Antagonism of the Glutamate-Induced and Synaptic Excitations of Thalarnic Neurons." Brain Research 39: 419-425, 1972.

10. Haldeman, S, McLeman, H: "The Antagonistic Action of Glutamic Acid Diethylester Towards Amino Acid-Induced and Synaptic Excitations of Central Neurons." Brain Research 45: 393-400, 1972

11. Haldeman, S, McLennan, H: "The Actions of the Dimethyl and Diethyl Esters of Glutamic Acid on Glutarnate Uptake by Brain Tissue." J. Neurochem. 20: 629-63 1, 1972

12. Haldema S: "Spinal and Paraspinal Receptors." Am. Chiropr. Assn. J. 6, 5: 25-31, 1972.

13. Haldeman, S: "Autoregulation of Renal Blood Flow and Glomerular Filtration Rate." Internat. Rev. Chiropr. 25 5: 17-19, 1972.

14. Haldeman, S: "Histamine: The Ultimate Stimulator of Gastric Acid Secretion?." J Can. Chiropr Assn. 16 3: 25-29, 1972.

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U.S. Supreme Court

COPPERWELD CORP. v. INDEPENDENCE TUBE CORP., 467 U.S. 752 (1984)

467 U.S. 752

COPPERWELD CORP. ET AL. v. INDEPENDENCE TUBE CORP.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-1260.

Argued December 5, 1983
Decided June 19, 1984

Petitioner Copperweld Corp. purchased petitioner Regal Tube Co., a manufacturer of steel tubing, from Lear Siegler, Inc., which had operated Regal as an unincorporated division, and which under the sale agreement was bound not to complete with Regal for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned subsidiary. Shortly before Copperweld acquired Regal, David Grohne, who previously had been an officer of Regal, became an officer of Lear Siegler, and, while continuing to work for Lear Siegler, formed respondent corporation to compete with Regal. Respondent then gave Yoder Co. a purchase order for a tubing mill, but Yoder voided the order when it received a letter from Copperweld warning that Copperweld would be greatly concerned if Grohne contemplated competing with Regal and promising to take the necessary steps to protect Copperweld's rights under the noncompetition agreement with Lear Siegler. Respondent then arranged to have a mill supplied by another company. Thereafter respondent filed an action in Federal District Court against petitioners and Yoder. The jury found, inter alia, that petitioners had

conspired to violate 1 of the Sherman Act but that Yoder was not part of the conspiracy, and awarded treble damages against petitioners. The Court of Appeals affirmed. Noting that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the 1 conspiracy, the court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, but held that such liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible," and that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

Held: Petitioner Copperweld and its wholly owned subsidiary, petitioner Regal, are incapable of conspiring with each other for purposes of 1 of the Sherman Act. Pp. 759-777.

(a) While this Court has previously seemed to acquiesce in the "intra-enterprise conspiracy" doctrine, which provides that 1 liability is not [467 U.S. 752, 753] foreclosed merely because a parent and its subsidiary are subject to common ownership, the Court has never explored or analyzed in detail the justifications for such a rule. Pp. 759-766.

(b) Section 1 of the Sherman Act, in contrast to 2, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between separate entities, and does not reach conduct that is "wholly unilateral." Pp. 767-769.

(c) The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of 1 of the Sherman Act. A parent and its wholly owned subsidiary have

a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement," the subsidiary acts for the parent's benefit. If the parent and subsidiary "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for 1 scrutiny. In reality, the parent and subsidiary always have a "unity of purpose or a common design." The "intra-enterprise conspiracy" doctrine relies on artificial distinctions, looking to the form of an enterprise's structure and ignoring the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. Here, nothing in the record indicates any meaningful difference between Regal's operations as an unincorporated division of Lear Siegler and its later operations as a wholly owned subsidiary of Copperweld. Pp. 771-774.

(d) The appropriate inquiry in this case is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects or whether the term "conspiracy" will bear a literal construction that includes a parent and its subsidiaries, but rather whether the logic underlying Congress' decision to exempt unilateral conduct from scrutiny under 1 of the Sherman Act similarly excludes the conduct of a parent and subsidiary. It can only be concluded that the coordinated behavior of a parent and subsidiary falls outside the reach of 1. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be

policed adequately without resort to an "intra-enterprise conspiracy" doctrine. A corporation's initial acquisition of control is always subject to scrutiny under 1 of the Sherman Act and 7 of the Clayton Act, and thereafter the enterprise is subject to 2 of the Sherman Act and 5 of the Federal Trade Commission Act. Pp. 774-777.

691 F.2d 310, reversed. [467 U.S. 752, 754]

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 778. WHITE, J., took no part in the consideration or decision of the case.

Erwin N. Griswold argued the cause for petitioners. With him on the briefs were William R. Jentes, Sidney N. Herman, Robert E. Shapiro, and Donald I. Baker.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Lee, Assistant Attorney General Baxter, Deputy Assistant Attorney General Collins, Carolyn F. Corwin, Barry Grossman, and Nancy C. Garrison.

Victor E. Grimm argued the cause for respondent. With him on the brief were John R. Myers and Scott M. Mendel.

J. Randolf Wilson, Russel H. Carpenter, Jr., Stephen A. Bokat, Cynthia Wicker, William E. Blasier, and Quentin Riegel filed a brief for the Chamber of Commerce of the United States et al. as amici curiae urging reversal.

A brief of amici curiae urging affirmance was filed for the State of Alabama et al. by Robert K. Corbin, Attorney General of Arizona, and Richard A. Alcorn and Charles L. Eger, Assistant Attorneys General; Charles A. Graddick, Attorney General of Alabama, and Richard Owen, Assistant Attorney General; John Steven Clark, Attorney General of Arkansas, and Jeffrey A. Bell, Assistant Attorney General; Duane Woodard, Attorney General of Colorado, and Thomas P. McMahon, Assistant Attorney General; Neil F. Hartigan, Attorney General of Illinois, and Robert E. Davy, Assistant Attorney General; Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Assistant Attorney General; Robert T. Stephan, Attorney General of Kansas, and Wayne E. Hundley, Deputy Attorney General; Steven L. Beshear, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General; Hubert H. Humphrey III, Attorney General of Minnesota, and Stephen P. Kilgriff, Assistant Attorney General; Bill Allain, Attorney General of Mississippi, and Robert Sanders, Special Assistant Attorney General; Mike Greely, Attorney General of Montana, and Joe R. Roberts, Assistant Attorney General; Paul L. Douglas, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General; Robert O. Wefald, Attorney General of North Dakota, and Alan C. Hoberg, Assistant Attorney General; Michael C. Turpen, Attorney [467 U.S. 752, 755] General of Oklahoma, and James B. Franks, Assistant Attorney General; Dave Frohnmayer, Attorney General of Oregon; John J. Easton, Jr., Attorney General of Vermont, and Glenn R. Jarrett, Assistant Attorney General; Ken Eikenberry, Attorney General of Washington, John R. Ellis, Deputy Attorney General, and Jon P. Ferguson, Assistant Attorney General; Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General; Joseph I. Lieberman, Attorney General of Connecticut, and Robert M. Langer, Assistant Attorney General; Charles M. Oberly, Attorney General of Delaware, and Vincent M. Amberly, Deputy Attorney

General; James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Senior Assistant Attorney General; Stephen H. Sachs, Attorney General of Maryland, and Charles O. Monk II, Assistant Attorney General; Frank J. Kelley, Attorney General of Michigan, and Edwin M. Bladen, Assistant Attorney General; Paul Bardacke, Attorney General of New Mexico; Rufus L. Edmisten, Attorney General of North Carolina, and H. A. Cole, Jr., Special Deputy Attorney General; Dennis J. Roberts II, Attorney General of Rhode Island, and Faith A. LaSalle, Special Assistant Attorney General; Mark V. Meierhenry, Attorney General of South Dakota, and Dennis R. Holmes, Deputy Attorney General; William M. Leech, Jr., Attorney General of Tennessee, and William J. Haynes, Jr., Deputy Attorney General; David L. Wilkinson, Attorney General of Utah, Stephen G. Schwendiman, Chief, Assistant Attorney General, and Suzanne M. Dallimore, Assistant Attorney General; A. G. McClintock, Attorney General of Wyoming, and Gay Vanderpoel, Senior Assistant Attorney General; Inez Smith Reid, Acting Corporation Council for the District of Columbia, and Francis S. Smith, Assistant Corporation Council.

Briefs of amici curiae were filed for the Canadian Manufacturers Association et al. by John DeQ. Briggs III, Scott E. Flick, and Jan Schneider; and for Kaiser Aluminum & Chemical Corporation by Milton Handler and John A. Moore. [467 U.S. 752, 755]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with each other under 1 of the Sherman Act.

I

A

The predecessor to petitioner Regal Tube Co. was established in Chicago in 1955 to manufacture structural steel [467 U.S. 752, 756] tubing used in heavy equipment, cargo vehicles, and construction. From 1955 to 1968 it remained a wholly owned subsidiary of C. E. Robinson Co. In 1968 Lear Siegler, Inc., purchased Regal Tube Co. and operated it as an unincorporated division. David Grohne, who had previously served as vice president and general manager of Regal, became president of the division after the acquisition.

In 1972 petitioner Copperweld Corp. purchased the Regal division from Lear Siegler; the sale agreement bound Lear Siegler and its subsidiaries not to compete with Regal in the United States for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned Pennsylvania corporation, petitioner Regal Tube Co. The new subsidiary continued to conduct its manufacturing operations in Chicago but shared Copperweld's corporate headquarters in Pittsburgh.

Shortly before Copperweld acquired Regal, David Grohne accepted a job as a corporate officer of Lear Siegler. After the acquisition, while continuing to work for Lear Siegler, Grohne set out to establish his own steel tubing business to compete in the same market as Regal. In May 1972 he formed respondent Independence Tube Corp., which soon secured an offer from the Yoder Co. to supply a tubing mill. In December 1972 respondent gave Yoder a purchase order to have a mill ready by the end of December 1973.

When executives at Regal and Copperweld learned of Grohne's plans, they initially hoped that Lear Siegler's noncompetition agreement would thwart the new competitor. Although their lawyer advised them that Grohne was not bound by the agreement, he did suggest that petitioners might obtain an injunction against Grohne's activities if he made use of any technical information or trade secrets belonging to Regal. The legal opinion was given to Regal and Copperweld along with a letter to be sent to anyone with whom Grohne attempted to deal. The letter warned that Copperweld would be "greatly concerned if [Grohne] contemplates [467 U.S. 752, 757] entering the structural tube market . . . in competition with Regal Tube" and promised to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." Petitioners later asserted that the letter was intended only to prevent third parties from developing reliance interests that might later make a court reluctant to enjoin Grohne's operations.

When Yoder accepted respondent's order for a tubing mill on February 19, 1973, Copperweld sent Yoder one of these letters; two days later Yoder voided its acceptance. After respondent's efforts to resurrect the deal failed, respondent arranged to have a mill supplied by another company, which performed its agreement even though it too received a warning letter from Copperweld. Respondent began operations on September 13, 1974, nine months later than it could have if Yoder had supplied the mill when originally agreed.

Although the letter to Yoder was petitioners' most successful effort to discourage those contemplating doing business with respondent, it was not their only one. Copperweld repeatedly contacted banks that were considering financing respondent's operations. One or both

petitioners also approached real estate firms that were considering providing plant space to respondent and contacted prospective suppliers and customers of the new company.

B

In 1976 respondent filed this action in the District Court against petitioners and Yoder.[1] The jury found that [467 U.S. 752, 758] Copperweld and Regal had conspired to violate 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, but that Yoder was not part of the conspiracy. It also found that Copperweld, but not Regal, had interfered with respondent's contractual relationship with Yoder; that Regal, but not Copperweld, had interfered with respondent's contractual relationship with a potential customer of respondent, Deere Plow & Planter Works, and had slandered respondent to Deere; and that Yoder had breached its contract to supply a tubing mill.

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[1] The chairman of the board and chief executive officer of both Copperweld and Regal, Phillip H. Smith, was also named as a defendant. In addition, respondents originally charged petitioners and Smith with an attempt to monopolize the market for structural steel tubing in violation of 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 2. Before [467 U.S. 752, 758] trial respondent dismissed Smith as a defendant and dismissed its 2 monopolization count.

Petitioners counterclaimed on the ground that respondent and Grohne had used proprietary information belonging to Regal, had competed unfairly by hiring away key Regal personnel, and had interfered with prospective business relationships by filing the lawsuit on the eve of a large Copperweld debenture offering. At the close of the evidence, the court directed a verdict against petitioners on their counterclaims. The disposition of these claims is not at issue before this Court.

At a separate damages phase, the judge instructed the jury that the damages for the antitrust violation and for the inducement of the Yoder contract breach should be identical and not double counted. The jury then awarded $2,499,009 against petitioners on the antitrust claim, which was trebled to $7,497,027. It awarded $15,000 against Regal alone on the contractual interference and slander counts pertaining to Deere. The court also awarded attorney's fees and costs after denying petitioners' motions for judgment n.o.v. and for a new trial.

C

The United States Court of Appeals for the Seventh Circuit affirmed. 691 F.2d 310 (1982). It noted that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the § 1 conspiracy. The court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, when the same conduct by a corporation and an unincorporated [467 U.S. 752, 759] division would escape liability for lack of the requisite two legal persons. However, relying on its decision in Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (1979), cert. denied, 445 U.S. 917 (1980), the Court of Appeals held that liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible." 691 F.2d, at 318. It held that the jury instructions took account of the proper factors for determining how much separation Copperweld and Regal

in fact maintained in the conduct of their businesses.[2] It also held that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

We granted certiorari to reexamine the intra-enterprise conspiracy doctrine, 462 U.S. 1131 (1983), and we reverse.

II

Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by 1 of the Sherman Act, constitute a combination or conspiracy.[3] The so-called "intra-enterprise conspiracy" doctrine provides that 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership. The

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[2] The jury was instructed to consider many different factors: for instance, whether Copperweld and Regal had separate management staffs, separate corporate officers, separate clients, separate records and bank accounts, separate corporate offices, autonomy in setting policy, and so on. The jury also was instructed to consider "any other facts that you find are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies." App. to Pet. for Cert. B-9.

[3] Section 1 of the Sherman Act provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony." 26 Stat. 209, as amended, 15 U.S.C. 1.

doctrine derives from declarations in several of this Court's opinions. [467 U.S. 752, 760]

In no case has the Court considered the merits of the intra-enterprise conspiracy doctrine in depth. Indeed, the concept arose from a far narrower rule. Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.

The problem began with United States v. Yellow Cab Co., 332 U.S. 218 (1947). The controlling shareholder of the Checker Cab Manufacturing Corp., Morris Markin, also controlled numerous companies operating taxicabs in four cities. With few exceptions, the operating companies had once been independent and had come under Markin's control by acquisition or merger. The complaint alleged conspiracies under 1 and 2 of the Sherman Act among Markin, Checker, and five corporations in the operating system. The Court stated that even restraints in a vertically integrated enterprise were not "necessarily" outside of the Sherman Act, observing that an unreasonable restraint

> "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. See Appalachian

Coals, Inc. v. United States, 288 U.S. 344, 360 - 361, 376-377.

"And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object [467 U.S. 752, 761] of the combination. The theory of the complaint . . . is that `dominating power' over the cab operating companies `was not obtained by normal expansion . . . but by deliberate, calculated purchase for control.'" Id., at 227-228 (emphasis added) (quoting United States v. Reading Co., 253 U.S. 26, 57 (1920)).

It is the underscored language that later breathed life into the intra-enterprise conspiracy doctrine. The passage as a whole, however, more accurately stands for a quite different proposition. It has long been clear that a pattern of acquisitions may itself create a combination illegal under 1, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent

conduct.[4] The Yellow Cab passage is most fairly read in light of this settled rule. In Yellow Cab, the affiliation of the defendants was irrelevant because the original acquisitions were themselves illegal.[5] An affiliation "flowing from an illegal conspiracy" would not avert sanctions. Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination," which was created in a "`deliberate, [467 U.S. 752, 762] calculated'" manner. Other language in the opinion is to the same effect.[6]

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[4] Under the arrangements condemned in Northern Securities Co. v. United States, 193 U.S. 197, 354 (1904) (plurality opinion), "all the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose." In Standard Oil Co. v. United States, 221 U.S. 1 (1911), and United States v. American Tobacco Co., 221 U.S. 106 (1911), the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power. Although the Court in the latter case suggested that the contracts between affiliated companies, and not merely the original combination, could be viewed as the conspiracy, id., at 184, the Court left no doubt that "the combination in and of itself" was a restraint of trade and a monopolization, id., at 187.

[5] Contrary to the dissent's suggestion, post, at 779, 788, n. 18, our point is not that Yellow Cab found only the initial acquisition illegal; our point is that the illegality of the initial acquisition was a predicate for its holding that any postacquisition conduct violated the Act.

[6] When discussing the fact that some of the affiliated Chicago operating companies did not compete to obtain exclusive transportation contracts held by another of the affiliated companies, the Court stated:

> "[T]he fact that the competition restrained is that between affiliated corporations cannot serve to

The Court's opinion relies on Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); however, examination of that case reveals that it gives very little support for the broad doctrine Yellow Cab has been thought to announce. On the contrary, the language of Chief Justice Hughes speaking for the Court in Appalachian Coals supports a contrary conclusion. After observing that "[t]he restrictions

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> negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." 332 U.S., at 229 (emphasis added).

The passage quoted in text is soon followed by a cite to United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944). Crescent Amusement found violations of 1 and 2 by film exhibitors affiliated (in most cases) by 50 percent ownership. The exhibitors used the monopoly power they possessed in certain towns to force film distributors to give them favorable terms in other towns. The Court found it unnecessary to view the distributors as part of the conspiracy, id., at 183, so the Court plainly viewed the affiliated entities themselves as the conspirators. The Crescent Amusement Court, however, in affirming an order of divestiture, noted that such a remedy was appropriate when "creation of the combination is itself the violation." Id., at 189. This suggests that both Crescent Amusement and Yellow Cab, which cited the very page on which this passage appears, stand for a narrow rule based on the original illegality of the affiliation.

The dissent misconstrues a later passage in Crescent Amusement stating that divestiture need not be limited to those affiliates whose "acquisition was part of the fruits of the conspiracy," 323 U.S., at 189 . See post, at 780-781. This meant only that divestiture could apply to affiliates other than those who were driven out of business by the practices of the original conspirators and who were then acquired illegally to increase the combination's monopoly power. See 323 U.S., at 181 . It did not mean that affiliates acquired for lawful purposes were subject to divestiture.

the Act imposes are not mechanical or artificial," 288 U.S., at 360, he went on to state: [467 U.S. 752, 763]

> "The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal - that one is a legitimate enterprise and the other is not - makes but an artificial distinction. The Anti-Trust Act aims at substance." Id., at 377. [7]

As we shall see, infra, at 771-774, it is the intra-enterprise conspiracy doctrine itself that "makes but an artificial distinction" at the expense of substance.

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[7] Appalachian Coals does state that the key question is whether there is an unreasonable restraint of trade or an attempt to monopolize. "If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration." 288 U.S., at 377. Appalachian Coals, however, validated a cooperative selling arrangement among independent entities. The statement that intracorporate relationships would be subject to liability under 1 is thus dictum. The statement may also envision merely the limited rule in Yellow Cab pertaining to acquisitions that are themselves anticompetitive.

The ambiguity of the Yellow Cab holding yielded the one case giving support to the intra-enterprise conspiracy doctrine.[8] In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), the Court held that two wholly owned subsidiaries of a liquor distiller were guilty under 1 of the Sherman Act for jointly refusing to supply a wholesaler who declined to abide by a maximum resale pricing scheme. The Court offhandedly dismissed the defendant's argument [467 U.S. 752, 764] that "their status as `mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act." Id., at 215. With only a citation to Yellow Cab and no further analysis, the Court stated that the

> "suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws"

and stated that this rule was "especially applicable" when defendants "hold themselves out as competitors." 340 U.S., at 215.

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[8] In two cases decided soon after Yellow Cab on facts similar to Crescent Amusement, see n. 6, supra, affiliated film exhibitors were found to have conspired in violation of 1. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948). Griffith simply assumed that the companies were capable of conspiring with each other; Schine cited Yellow Cab and Crescent Amusement for the proposition, 334 U.S., at 116. In both cases, however, an intra-enterprise conspiracy holding was unnecessary not only because the Court found a 2 violation, but also because the affiliated exhibitors had conspired with independent film distributors. See ibid.; Griffith, supra, at 103, n. 6, 109.

Unlike the Yellow Cab passage, this language does not pertain to corporations whose initial affiliation was itself unlawful. In straying beyond Yellow Cab, the Kiefer-Stewart Court failed to confront the anomalies an intra-enterprise doctrine entails. It is relevant nonetheless that, were the case decided today, the same result probably could be justified on the ground that the subsidiaries conspired with wholesalers other than the plaintiff.[9] An intra-enterprise conspiracy doctrine thus would no longer be necessary to a finding of liability on the facts of Kiefer-Stewart.

Later cases invoking the intra-enterprise conspiracy doctrine do little more than cite Yellow Cab or Kiefer-Stewart, and in none of the cases was the doctrine necessary to the result reached. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), involved restrictive horizontal agreements [467 U.S. 752, 765] between an American corporation and two foreign corporations in which it owned 30 and 50 percent interests respectively. The Timken Court cited Kiefer-Stewart to show that "[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." 341 U.S., at 598 . But the relevance of this statement is unclear. The American defendant in Timken did not own a majority interest in either of the foreign

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[9] Although the plaintiff apparently never acquiesced in the resale price maintenance scheme, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 182 F.2d 228, 231 (CA7 1950), rev'd, 340 U.S. 211 (1951), one of the subsidiaries did gain the compliance of other wholesalers after once terminating them for refusing to abide by the pricing scheme. See 182 F.2d, at 231; 340 U.S., at 213 . A theory of combination between the subsidiaries and the wholesalers could now support 1 relief, whether or not it could have when Kiefer-Stewart was decided. See Albrecht v. Herald Co., 390 U.S. 145, 149 -150, and n. 6 (1968); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

corporate conspirators and, as the District Court found, it did not control them.[10] Moreover, as in Yellow Cab, there was evidence that the stock acquisitions were themselves designed to effectuate restrictive practices.[11] The Court's reliance on the intra-enterprise conspiracy doctrine was in no way necessary to the result.

The same is true of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), which involved a conspiracy among a parent corporation and three subsidiaries to impose various illegal restrictions on plaintiff franchisees. The Court did suggest that, because the defendants

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[10] See United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 311-312 (ND Ohio 1949), aff'd as modified, 341 U.S. 593 (1951). The agreement of an individual named Dewar, who owned 24 and 50 percent of the foreign corporations respectively, was apparently required for the American defendant to have its way.

[11] For almost 20 years before they became affiliated by stock ownership, two of the corporations had been party to the sort of restrictive agreements the Timken Court condemned. Three Justices upholding antitrust liability were of the view that Timken's "interests in the [foreign] companies were obtained as part of a plan to promote the illegal trade restraints" and that the "intercorporate relationship" was "the core of the conspiracy." Id., at 600-601. Because two Justices found no antitrust violation at all, see id., at 605 (Frankfurter, J., dissenting); id., at 606 (Jackson, J., dissenting), and two Justices did not take part, apparently only Chief Justice Vinson and Justice Reed were prepared to hold that there was a violation even if the initial acquisition itself was not illegal. See id., at 601-602 (Reed, J., joined by Vinson, C. J., concurring).

> "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership [467 U.S. 752, 766] could not save them from any of the obligations that the law imposes on separate entities [citing Yellow Cab and Timken]." Id., at 141-142.

But the Court noted immediately thereafter that "[i]n any event" each plaintiff could "clearly" charge a combination between itself and the defendants or between the defendants and other franchise dealers. Ibid. Thus, for the same reason that a finding of liability in Kiefer-Stewart could today be justified without reference to the intra-enterprise conspiracy doctrine, see n. 9, supra, the doctrine was at most only an alternative holding in Perma Life Mufflers.

In short, while this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule; the doctrine has played only a relatively minor role in the Court's Sherman Act holdings.

III

Petitioners, joined by the United States as amicus curiae, urge us to repudiate the intra-enterprise conspiracy doctrine.[12] The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two [467 U.S. 752, 767] entities what is really unilateral behavior flowing from decisions of a single enterprise.

We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

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[12] The doctrine has long been criticized. See, e. g., Areeda, Intra-enterprise Conspiracy in Decline, 97 Harv. L. Rev. 451 (1983); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23 (1981); Kempf, Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?, 24 Bus. Law. 173 (1968); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183 (1955); Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743 (1950); Sprunk, Intra-Enterprise Conspiracy, 9 ABA Antitrust Section Rep. 20 (1956); Stengel, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act, 35 Miss. L. J. 5 (1963); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N. Y. U. L. Rev. 20 (1968); Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv. L. Rev. 661 (1982); Note, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717 (1977).

A

The Sherman Act contains a "basic distinction between concerted and independent action." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984). The conduct of a single firm is governed by 2 alone and is unlawful only when it threatens actual monopolization.[13] It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims

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13 Section 2 of the Sherman Act provides in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 26 Stat. 209, as amended, 15 U.S.C. 2. By making a conspiracy to monopolize unlawful, 2 does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under 2 and not under 1. Monopolization without conspiracy is unlawful under 2, but restraint of trade without a conspiracy or combination is not unlawful under 1.

to foster.[14] In part because it is sometimes difficult to [467 U.S. 752, 768] distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between separate entities. It does not reach conduct that is "wholly unilateral." Albrecht v. Herald Co., 390 U.S. 145, 149 (1968); accord, Monsanto Co. v. Spray-Rite Corp., supra, at 761. Concerted activity subject to 1 is judged more sternly than unilateral activity under 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. See generally Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958). Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. See, e. g., Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Chicago Board

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[14] For example, the Court has declared that 2 does not forbid market power to be acquired "as a consequence of a superior product, [or] business acumen." United States v. Grinnell Corp., 384 U.S. 563, 571 (1966). We have also made clear that the "antitrust laws . . . were enacted for `the protection of competition, not competitors.'" Brunswick Corp. v. Pueblo [467 U.S. 752, 768] Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (damages for violation of Clayton Act 7) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

of Trade v. United States, 246 U.S. 231 (1918). Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive [467 U.S. 752, 769] risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

B

The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the same company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a

business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a 1 conspiracy.[15] [467 U.S. 752, 770]

There is also general agreement that 1 is not violated by the internally coordinated conduct of a corporation and

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[15] See, e. g., Schwimmer v. Sony Corp. of America, 677 F.2d 946, 953 (CA2), cert. denied, 459 U.S. 1007 (1982); Tose v. First Pennsylvania Bank, N. A., 648 F.2d 879, 893-894 (CA3), cert. denied, 454 U.S. 893 (1981); Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910, 916-917 (CA8 1976); Greenville Publishing Co. v. Daily Reflector, [467 U.S. 752, 770] Inc., 496 F.2d 391, 399 (CA4 1974) (dictum); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643, n. 9 (CA9 1969); Poller v. Columbia Broadcasting System, Inc., 109 U.S. App. D.C. 170, 174, 284 F.2d 599, 603 (1960), rev'd on other grounds, 368 U.S. 464 (1962); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (CA5 1952), cert. denied, 345 U.S. 925 (1953). Accord, Report of the Attorney General's National Committee to Study the Antitrust Laws 31 (1955). At the same time, many courts have created an exception for corporate officers acting on their own behalf. See, e. g., H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244 (CA5 1978) (dictum); Greenville Publishing, supra; Johnston v. Baker, 445 F.2d 424, 427 (CA3 1971). Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers. It is true that a "person" under the Act includes both an individual and a corporation. 15 U.S.C. 7. But 1 does not declare every combination between two "persons" to be illegal. Instead it makes liable every "person" engaging in a combination or conspiracy "hereby declared to be illegal." As we note, the principles governing 1 liability plainly exclude from unlawful combinations or conspiracies the activities of a single firm.

one of its unincorporated divisions.[16] Although this Court has not previously addressed the question,[17] there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation [467 U.S. 752, 771] and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants 1 scrutiny.

Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

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16 See 691 F.2d 310, 316 (CA7 1982) (decision below); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 205-206 (CA5 1969); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 83-84 (CA9 1969), cert. denied, 396 U.S. 1062 (1970); Poller v. Columbia Broadcasting System, Inc., 109 U.S. App. D.C., at 174, 284 F.2d, at 603.

17 The Court left this issue unresolved in Poller v. Columbia Broadcasting System, Inc., 368 U.S., at 469, n. 4.

C

For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for 1 scrutiny.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946). But in reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert [467 U.S. 752, 772] full control at any moment if the subsidiary fails to act in the parent's best interests.[18]

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[18] As applied to a wholly owned subsidiary, the so-called "single entity" test is thus inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct. Followed by the Seventh Circuit below as well as by other Courts of Appeals, this test sets forth various criteria for evaluating

The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition.[19] Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate

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whether a given parent and subsidiary are capable of conspiring with each other. See n. 2, supra; see generally Ogilvie v. Fotomat Corp., 641 F.2d 581 (CA8 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (CA9 1979), cert. denied, 447 U.S. 906 (1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (CA7 1979), cert. denied, 445 U.S. 917 (1980). These criteria measure the "separateness" of the subsidiary: whether it has separate control of its day-to-day operations, separate officers, separate corporate headquarters, and so forth. At least when a subsidiary is wholly owned, however, these factors are not sufficient to describe a separate economic entity for purposes of the Sherman Act. The factors simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.

[19] Because an "agreement" between a parent and its wholly owned subsidiary is no more likely to be anticompetitive than an agreement between two divisions of a single corporation, it does not matter that the parent "availed [itself] of the privilege of doing business through separate corporations," Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141 (1968). The purposeful choice of a parent corporation to organize a subunit as a subsidiary is not itself a reason to heighten antitrust scrutiny, because it is not laden with anticompetitive risk.

incorporation may improve [467 U.S. 752, 773] management, avoid special tax problems arising from multistate operations, or serve other legitimate interests.[20] Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability. Because there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary, the intra-enterprise conspiracy doctrine "impose[s] grave legal consequences upon organizational distinctions that are of de minimis meaning and effect." Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29 (1962).[21]

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[20] For example, "[s]eparate incorporation may reduce federal or state taxes or facilitate compliance with regulatory or reporting laws. Local incorporation may also improve local identification. Investors or lenders may prefer to specialize in a particular aspect of a conglomerate's business. Different parts of the business may require different pension or profit-sharing plans or different accounting practices." Areeda, 97 Harv. L. Rev., at 453.

[21] Sunkist Growers provides strong support for the notion that separate incorporation does not necessarily imply a capacity to conspire. The defendants in that case were an agricultural cooperative, its wholly owned subsidiary, and a second cooperative comprising only members of the first. The Court refused to find a 1 or 2 conspiracy among them because they were "one `organization' or `association' even though they have formally organized themselves into three separate legal entities." 370 U.S., at 29. Although this holding derived from statutory immunities granted to agricultural organizations, the reasoning of Sunkist Growers supports the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under 1.

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Indeed, this is precisely what the Seagram company did after this Court's decision in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).[22] Such an [467 U.S. 752, 774] incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.

The error of treating a corporate division differently from a wholly owned subsidiary is readily seen from the facts of this case. Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld. Nothing in this record indicates any meaningful difference between Regal's operations as a division and its later operations as a separate corporation. Certainly nothing suggests that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler. Under either arrangement, Regal might have acted to bar a new competitor from entering the market. In one case it could have relied on economic power from other quarters of the Lear Siegler corporation; instead it drew on the strength of its separately incorporated parent, Copperweld. From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other. As Chief Justice Hughes cautioned,

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22 See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (CA9 1969), cert. denied, 396 U.S. 1062 (1970).

"[r]ealities must dominate the judgment." Appalachian Coals, Inc. v. United States, 288 U.S., at 360.[23]

D

Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily disappoint those who find that distinction arbitrary. It cannot be denied that 1's focus on concerted [467 U.S. 752, 775] behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. See post, at 789. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such - but only restraints effected by a contract, combination, or conspiracy - it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to 1 liability.

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[23] The dissent argues that references in the legislative history to "trusts" suggest that Congress intended 1 to govern the conduct of all affiliated corporations. See post, at 787-788. But those passages explicitly refer to combinations created for the very purpose of restraining trade. None of the cited debates refers to the postacquisition conduct of corporations whose initial affiliation was lawful. Indeed, Senator Sherman stated:

> "It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." 21 Cong. Rec. 2457 (1890).

We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. See supra, at 767-769. Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of 2.[24] Indeed, this Court has

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[24] Even if common-law intracorporate conspiracies were firmly established when Congress passed the Sherman Act, the obvious incompatibility of an intracorporate conspiracy with 1 is sufficient to refute the dissent's suggestion that Congress intended to incorporate such a definition. See post, at 784-787. Moreover, it is far from clear that intracorporate conspiracies were recognized at common law in 1890. Even today courts disagree whether corporate employees can conspire with themselves or with the corporation for purposes of certain statutes, such as 42 U.S.C. 1985(3). Compare, e. g., Novotny v. Great Am. Fed. Sav. & Loan Assn., 584 F.2d 1235 (CA3 1978) (en banc), vacated and remanded on other grounds, 442 U.S. 366 (1979), with Dombrowski v. Dowling, 459 F.2d 190 (CA7 1972). And in 1890 it was disputed whether a corporation could itself be guilty of a crime that required criminal intent, such as [467 U.S. 752, 776] conspiracy. Commentators appear to agree that courts began finding corporate liability for such crimes only around the turn of the century. See generally Edgerton, Corporate Criminal Responsibility, 36 Yale L. J. 827, 828, and n. 11 (1927); Miller, Corporate Criminal Liability: A Principle Extended to Its Limits, 38 Fed. Bar J. 49 (1979); Note, 60 Harv. L. Rev. 283, 284, and n. 9 (1946). Of course, Congress changed that common-law rule when it explicitly provided that a corporation could be guilty of a 1 conspiracy. But the point remains that the Sherman Act did not import a pre-existing common-law tradition recognizing conspiracies between corporations and their own employees.

recognized [467 U.S. 752, 776] that 1 is limited to concerted conduct at least since the days of United States v. Colgate & Co., 250 U.S. 300 (1919). Accord, post, at 789.

The appropriate inquiry in this case, therefore, is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects, as the dissent suggests. Nor is it whether the term "conspiracy" will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a single firm's conduct would be subject to 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority. See n. 15, supra. Rather, the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of that provision.

Although we recognize that any "gap" the Sherman Act leaves is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open [467 U.S. 752, 777] to serious question. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under 1 of the Sherman Act and 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 18. Thereafter, the enterprise is fully subject to 2 of the

Sherman Act and 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. 45. That these statutes are adequate to control dangerous anticompetitive conduct is suggested by the fact that not a single holding of antitrust liability by this Court would today be different in the absence of an intra-enterprise conspiracy doctrine. It is further suggested by the fact that the Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can "combine" or "conspire" under 1.[25] Elimination of the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries will therefore not cripple antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions.

IV

We hold that Copperweld and its wholly owned subsidiary Regal are incapable of conspiring with each other for purposes of 1 of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered. [467 U.S. 752, 778]

JUSTICE WHITE took no part in the consideration or decision of this case.

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25 "[T]he [intra-enterprise conspiracy] doctrine has played a relatively minor role in government enforcement actions, and the government has not relied on the doctrine in recent years." Brief for United States as Amicus Curiae 26, n. 42.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

It is safe to assume that corporate affiliates do not vigorously compete with one another. A price-fixing or market-allocation agreement between two or more such corporate entities does not, therefore, eliminate any competition that would otherwise exist. It makes no difference whether such an agreement is labeled a "contract," a "conspiracy," or merely a policy decision, because it surely does not unreasonably restrain competition within the meaning of the Sherman Act. The Rule of Reason has always given the courts adequate latitude to examine the substance rather than the form of an arrangement when answering the question whether collective action has restrained competition within the meaning of 1.

Today the Court announces a new per se rule: a wholly owned subsidiary is incapable of conspiring with its parent under 1 of the Sherman Act. Instead of redefining the word "conspiracy," the Court would be better advised to continue to rely on the Rule of Reason. Precisely because they do not eliminate competition that would otherwise exist but rather enhance the ability to compete, restraints which enable effective integration between a corporate parent and its subsidiary - the type of arrangement the Court is properly concerned with protecting - are not prohibited by 1. Thus, the Court's desire to shield such arrangements from antitrust liability provides no justification for the Court's new rule.

In contrast, the case before us today presents the type of restraint that has precious little to do with effective integration between parent and subsidiary corporations. Rather, the purpose of the challenged conduct was to exclude a potential competitor of the subsidiary from the market. The jury apparently concluded that the two

defendant corporations - [467 U.S. 752, 779] Copperweld and its subsidiary Regal - had successfully delayed Independence's entry into the steel tubing business by applying a form of economic coercion to potential suppliers of financing and capital equipment, as well as to potential customers. Everyone seems to agree that this conduct was tortious as a matter of state law. This type of exclusionary conduct is plainly distinguishable from vertical integration designed to achieve competitive efficiencies. If, as seems to be the case, the challenged conduct was manifestly anticompetitive, it should not be immunized from scrutiny under 1 of the Sherman Act.

I

Repudiation of prior cases is not a step that should be taken lightly. As the Court wrote only days ago: "[A]ny departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, ante, at 212. It is therefore appropriate to begin with an examination of the precedents.

In United States v. Yellow Cab Co., 332 U.S. 218 (1947), the Court explicitly stated that a corporate subsidiary could conspire with its parent:

> "The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." Id., at 227.

The majority attempts to explain Yellow Cab by suggesting that it dealt only with unlawful acquisition of subsidiaries. Ante, at 761-762. But the Court mentioned acquisitions only as an additional consideration separate from the passage [467 U.S. 752, 780] quoted above,[1] and more important, the Court explicitly held that restraints imposed by the corporate parent on the affiliates that it already owned in themselves violated 1.[2]

At least three cases involving the motion picture industry also recognize that affiliated corporations may combine or conspire within the meaning of 1. In United States v. Crescent Amusement Co., 323 U.S. 173 (1944), as the Court recognizes, ante, at 762, n. 6, the only conspirators were affiliated corporations. The majority's claim that the case involved only unlawful acquisitions because of the Court's comments concerning divestiture of the affiliates cannot be squared with the passage immediately following that cited by the majority, which states that there had been unlawful conduct going beyond the acquisition of subsidiaries:

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1 The language I have quoted, most of which is overlooked by the majority, makes it clear that the Court's adoption of the concept of conspiracy between affiliated corporations was unqualified. As the first word of the sentence indicates, the Court's following statement: "Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed," *332 U.S., at 227,* expresses a separate if related point.

2 "[B]y preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce." Id., at 226-227 (footnote omitted).

> "That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy. But the relief need not, and under these facts should not, be so restricted [to divestiture]. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, [467 U.S. 752, 781] there will be tempting opportunity for these exhibitors to continue to act in combination against the independents." 323 U.S., at 189 - 190 (emphasis supplied).

Similarly, in Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948), the Court held that concerted action by parents and subsidiaries constituted an unlawful conspiracy.[3] That was also the holding in United States v. Griffith, 334 U.S. 100, 109 (1948). The majority's observation that in these cases there were alternative grounds that could have been used to reach the same result, ante, at 763, n. 8, disguises neither the fact that the holding that actually appears in these opinions rests on conspiracy between affiliated entities, nor that today's holding is inconsistent with what was actually held in these cases.

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[3] "[T]he combining of the open and closed towns for the negotiation of films for the circuit was a restraint of trade and the use of monopoly power in violation of 1 and 2 of the Act. The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. See United States v. Yellow Cab Co., 332 U.S. 218, 227 ; United States v. Crescent Amusement Co., 323 U.S. 173 ." 334 U.S., at 116 .

In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), the Court's holding was plain and unequivocal:

> "Respondents next suggest that their status as `mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E. g. United States v. Yellow Cab Co., 332 U.S. 218 . The rule is especially applicable where, as here, respondents hold themselves out as competitors." Id., at 215. [467 U.S. 752, 782]

This holding is so clear that even the Court, which is not wanting for inventiveness in its reading of the prior cases, cannot explain it away. The Court suggests only that today Kiefer-Stewart might be decided on alternative grounds, ante, at 764, ignoring the fact that today's holding is inconsistent with the ground on which the case actually was decided.[4]

A construction of the statute that reaches agreements between corporate parents and subsidiaries was again embraced by the Court in Timken Roller Bearing Co. v.

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[4] In Kiefer-Stewart, Seagram unsuccessfully argued that Yellow Cab was confined to cases concerning unlawful acquisitions, see Brief for Respondents, O. T. 1950, No. 297, p. 21. Thus the Kiefer-Stewart Court considered and rejected exactly the same argument embraced by today's majority.

United States, 341 U.S. 593 (1951),[5] and Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).[6] The majority only notes that there might have been other grounds for decision available in these cases, ante, at 764-766, but again it cannot deny that its new rule is inconsistent with what the Court actually did write in these cases. [467 U.S. 752, 783]

Thus, the rule announced today is inconsistent with what this Court has held on at least seven previous occasions.[7] Perhaps most illuminating is the fact that until

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5 "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. E. g., Kiefer-Stewart Co. v. Seagram & Sons, [340 U.S.,] at 215. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a `joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled." 341 U.S., at 598 .

6 "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See Timken Co. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947)." 392 U.S., at 141 -142.

7 Also pertinent is United States v. Citizens & Southern National Bank, 422 U.S. 86 (1975), in which the Court wrote:

> "The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion - that is,

today, whether they favored the doctrine or not, it had been the universal conclusion of both the lower courts[8] and the commentators[9] that this Court's cases establish that a parent

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> by competing successfully rather than by arranging treaties with its competitors. This Court has held that even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. 'The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act.' United States v. Yellow Cab Co., 332 U.S. 218, 227 . See also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 ; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 ; Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141 -142." Id., at 116-117.

[8] See, e. g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1054 (CA9), cert. denied, 459 U.S. 825 (1982); Ogilvie v. Fotomat Corp., 641 F.2d 581, 587-588 (CA8 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-618 (CA9 1979), cert. denied, 447 U.S. 906 (1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726 (CA7 1979), cert. denied, 445 U.S. 917 (1980); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 33-35, and n. 49 (CA3), cert. denied, 439 U.S. 876 (1978); H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244-245 (CA5 1978); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 (CA1 1974), cert. denied, 421 U.S. 1004 (1975).

[9] See, e. g., Report of the Attorney General's National Committee to Study the Antitrust Laws 30-36 (1955) (hereinafter cited as Attorney General's Committee Report); L. Sullivan, Law of Antitrust 114 (1977); Areeda, Intraenterprise Conspiracy in Decline, 97 Harv. L. Rev. 451 (1983); Handler, Through the Antitrust Looking Glass - Twenty-First Annual Antitrust Review, 57 Calif. L. Rev. 182, 182-193 (1969); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23, 26-61 (1981); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183,

[467 U.S. 752, 784] and a wholly owned subsidiary corporation are capable of conspiring in violation of 1. In this very case the Court of Appeals observed:

> "[T]he salient factor is that the Supreme Court's decisions, while they need not be read with complete literalism, of course they cannot be ignored. It is no accident that every Court of Appeals to consider the question has concluded that a parent and its subsidiary have the same capacity to conspire, whether or not they can be found to have done so in a particular case." 691 F.2d 310, 317 (CA7 1982) (footnotes omitted).

Thus, we are not writing on a clean slate. "[W]e must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).[10] There can be no doubt that the Court today changes what has been taken to be the long-settled rule: a rule that

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188-212 (1955); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N. Y. U. L. Rev. 20, 22-24 (1968); Comment, [467 U.S. 752, 784] Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach, 71 Calif. L. Rev. 1732, 1739-1745 (1983) (hereinafter cited as Comment, Decisionmaking); Comment, All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?, 14 Duquesne L. Rev. 63 (1975); Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv. L. Rev. 661 (1982); Note, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717, 718-727 (1977) (hereinafter cited as Note, Suggested Standard).

[10] See also Monsanto Co. v. Spray-Rite Service Co., 465 U.S. 752, 769 (1984) (BRENNAN, J., concurring).

Congress did not revise at any point in the last four decades. At a minimum there should be a strong presumption against the approach taken today by the Court. It is to the merits of that approach that I now turn.

II

The language of 1 of the Sherman Act is sweeping in its breadth: "Every contract, combination in the form of trust or [467 U.S. 752, 785] otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal." 15 U.S.C. 1. This Court has long recognized that Congress intended this language to have a broad sweep, reaching any form of combination:

> "[I]n view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911).

This broad construction is illustrated by the Court's refusal to limit the statute to actual agreements. Even mere acquiescence in an anticompetitive scheme has been held sufficient to satisfy the statutory language.[11]

Since the statute was written against the background of the common law,[12] reference to the common law is particularly enlightening in construing the statutory requirement of a "contract, combination in the form of trust or otherwise, or conspiracy." Under the common law, the question whether [467 U.S. 752, 786] affiliated corporations constitute a plurality of actors within the meaning of the statute is easily answered. The well-settled rule is that a corporation is a separate legal entity; the separate corporate form cannot be disregarded.[13] The Congress that passed the Sherman Act was well acquainted with this rule. See 21 Cong. Rec. 2571 (1890) (remarks of Sen. Teller) ("Each corporation is a creature by itself"). Thus it has long been the law of criminal conspiracy that the officers of even a single corporation are capable of conspiring with each other or the

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11 See Albrecht v. Herald Co., 390 U.S. 145, 149 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). See also Monsanto Co. v. Spray-Rite Service Co., 465 U.S., at 764, n. 9.

12 E. g., Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 531-532 (1983); National Society of Professional Engineers v. United States, 435 U.S. 679, 687-688 (1978); Standard Oil, 221 U.S., at 59.

13 See, e. g., Schenley Corp. v. United States, 326 U.S. 432, 437 (1946) (per curiam); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440-442 (1934); Burnet v. Clark, 287 U.S. 410 (1932); Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 558-559 (1844); Bank of the United States v. Deveaux, 5 Cranch 61 (1809).

corporation.[14] This Court has held that a corporation can conspire with its employee,[15] and that a labor union can "combine" with its business agent within the meaning of 1.[16] This concept explains the Timken Court's statement that the affiliated corporations in that case made [467 U.S. 752, 787] "agreements between legally separate persons," 341 U.S., at 598. Thus, today's holding that agreements between parent and subsidiary corporations involve merely unilateral conduct is at odds with the way that this Court has traditionally understood the concept of a combination or conspiracy, and also at odds with the way in which the

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[14] Attorney General's Committee Report, supra n. 9, at 30-31 (citing Barron v. United States, 5 F.2d 799 (CA1 1925); Mininsohn v. United States, 101 F.2d 477 (CA3 1939); Egan v. United States, 137 F.2d 369 (CA8), cert. denied, 320 U.S. 788 (1943)). See also, e. g., United States v. Hartley, 678 F.2d 961, 971-972 (CA11 1982), cert. denied, 459 U.S. 1170 (1983); Alamo Fence Co. of Houston v. United States, 240 F.2d 179 (CA5 1957); Patterson v. United States, 222 F. 599, 618-619 (CA6), cert. denied, 238 U.S. 635 (1915); Union Pacific Coal Co. v. United States, 173 F. 737 (CA8 1909); United States v. Consolidated Coal Co., 424 F. Supp. 577, 579-581 (SD Ohio 1976); United States v. Griffin, 401 F. Supp. 1222, 1224-1225 (SD Ind. 1975), aff'd mem. sub nom. United States v. Metro Management Corp., 541 F.2d 284 (CA7 1976); United States v. Bridell, 180 F. Supp. 268, 273 (ND Ill. 1960); United States v. Kemmel, 160 F. Supp. 718 (MD Pa. 1958); Welling, Intracorporate Plurality in Criminal Conspiracy Law, 33 Hastings L. J. 1155, 1191-1199 (1982).

[15] See Hyde v. United States, 225 U.S. 347, 367-368 (1912). See also United States v. Sampson, 371 U.S. 75 (1962); Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); Lott v. United States, 367 U.S. 421 (1961); Nye & Nissen v. United States, 336 U.S. 613 (1949).

[16] See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921).

Congress that enacted the Sherman Act surely understood it.

Holding that affiliated corporations cannot constitute a plurality of actors is also inconsistent with the objectives of the Sherman Act. Congress was particularly concerned with "trusts," hence it named them in 1 as a specific form of "combination" at which the statute was directed. Yet "trusts" consisted of affiliated corporations. As Senator Sherman explained:

> "Because these combinations are always in many States and, as the Senator from Missouri says, it will be very easy for them to make a corporation within a State. So they can; but that is only one corporation of the combination. The combination is always of two or more, and in one case of forty-odd corporations, all bound together by a link which holds them under the name of trustees, who are themselves incorporated under the laws of one of the States." 21 Cong. Rec. 2569 (1890).

The activities of these "combinations" of affiliated corporations were of special concern:

> "[A]ssociated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals,

> and often under the control of a single man called a trustee, a chairman, or a president. [467 U.S. 752, 788]
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> "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. . . . It is this kind of a combination we have to deal with now." Id., at 2457.[17]

Thus, the corporate subsidiary, when used as a device to eliminate competition, was one of the chief evils to

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[17] See also 21 Cong. Rec. 2562 (1890) (remarks of Sen. Teller); id., at 2570 (remarks of Sen. Sherman); id., at 2609 (remarks of Sen. Morgan).

which the Sherman Act was addressed.[18] The anomaly in today's holding is that the corporate devices most similar to the original "trusts" are now those which free an enterprise from antitrust scrutiny. [467 U.S. 752, 789]

III

The Court's reason for rejecting the concept of a combination or conspiracy among a parent corporation and its wholly owned subsidiary is that it elevates form over substance - while in form the two corporations are separate legal entities, in substance they are a single integrated enterprise and hence cannot comprise the plurality of actors necessary to satisfy 1. Ante, at 771-774. In many situations the Court's reasoning is perfectly sensible, for the affiliation of corporate entities often is procompetitive precisely because, as the Court explains, it enhances efficiency. A challenge to conduct that is merely an incident of the desirable integration that accompanies such affiliation should fail. However, the protection of such conduct

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[18] This legislative history thus demonstrates the error in the majority's conclusion that only acquisitions of corporate affiliates fall within 1. See ante, at 761-762. The conduct of the trusts that Senator Sherman and others objected to went much further than mere acquisitions. Indeed, the irony of the Court's approach is that, had it been adopted in 1890, it would have meant that 1 would have no application to trust combinations which had already been formed - the very trusts to which Senator Sherman was referring.

I cannot believe that the Court really intends to express doubt as to whether the Congress that passed the Sherman Act thought conspiracy doctrine could apply to corporations. Ante, at 775-776, n. 24. If that were not the case, then the Sherman Act would have no application to corporations. Since, as is clear and as the Court concedes, the Sherman Act does apply to corporations, there can be no doubt that Congress intended to apply the law of conspiracy to agreements between corporations.

provides no justification for the Court's new rule, precisely because such conduct cannot be characterized as an unreasonable restraint of trade violative of 1. Conversely, the problem with the Court's new rule is that it leaves a significant gap in the enforcement of 1 with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration.

Since at least United States v. Colgate & Co., 250 U.S. 300 (1919), 1 has been construed to require a plurality of actors. This requirement, however, is a consequence of the plain statutory language, not of any economic principle. As an economic matter, what is critical is the presence of market power, rather than a plurality of actors.[19] From a competitive standpoint, a decision of a single firm possessing power to reduce output and raise prices above competitive levels has the same consequence as a decision by two firms acting together who have acquired an equivalent amount of market [467 U.S. 752, 790] power through an agreement not to compete.[20] Unilateral conduct

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19 Market power is the ability to raise prices above those that would be charged in a competitive market. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 , n. 46 (1984); United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620 (1977); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

20 Significantly, the Court never suggests that the plurality-of-actors requirement has any intrinsic economic significance. Rather, it suggests that the requirement has evidentiary significance: combinations are more likely to signal anticompetitive conduct than is unilateral activity: "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction." Ante, at 769. That is true, but it is also true of any ordinary commercial contract

by a firm with market power has no less anticompetitive potential than conduct by a plurality of actors which generates or exploits the same power,[21] and probably more, since the unilateral actor avoids the policing problems faced by cartels.

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between separate entities, as can be seen if one substitutes the word "contract" for "conspiracy" in the passage I have quoted. The language of the Sherman Act indicates that it treats "contracts" and "conspiracies" as equivalent concepts - both satisfy the multiplicity-of-actors requirement - and yet one of the most fundamental points in antitrust jurisprudence, dating at least to Standard Oil, is that there is nothing inherently anticompetitive about a contract. Similarly, an agreement to act "for common benefit" in itself is unremarkable - all agreements are in some sense a restraint of trade be they contracts or conspiracies. It is only when trade is unreasonably restrained that 1 is implicated. The Court's evidentiary concern lacks merit.

[21] We made this point in the context of resale price maintenance in United States v. Parke, Davis & Co., 362 U.S. 29 (1960):

> "The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as Colgate is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of a manufacturer's right `freely to exercise his own independent discretion as to parties with whom he will deal.'" Id., at 44 (quoting Colgate, 250 U.S., at 307).

The rule of Yellow Cab thus has an economic justification. It addresses a gap in antitrust enforcement by reaching anticompetitive agreements between affiliated corporations which [467 U.S. 752, 791] have sufficient market power to restrain marketwide competition, but not sufficient power to be considered monopolists within the ambit of 2 of the Act.[22] The doctrine is also useful when a third party declines to join a conspiracy to restrain trade among affiliated corporations, and is harmed as a result through a boycott or similar tactics designed to penalize the refusal. In such cases, since there has been no agreement with the third party, only an agreement between the affiliated corporations can be the basis for 1 inquiry.[23] Finally, it must be remembered that not all persons who

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22 "[I]t is the potential which this conspiracy concept holds for the development of a rational enforcement policy which, if anything, will ultimately attract the courts. If conduct of a single corporation which restrains trade were to violate Section 1, a forceful weapon would be available to the government with which to challenge conduct which in oligopolistic industries creates or reinforces entry barriers. Excessive advertising in the cereal, drug, or detergent industries, annual style changes in the auto industry, and other such practices could be reached as soon as they threatened to inhibit competition; there would be no need to wait until a `dangerous probability' of monopoly had been reached, the requirement under Section 2 `attempt' doctrine. Nor would a single firm restraint of trade rule be overbroad. It would in no way threaten single firm activity - setting a price, deciding what market it would deal in, or the like - which did not threaten competitive conditions." L. Sullivan, supra n. 9, 114, at 324 (footnotes omitted).

23 This was the case in Kiefer-Stewart, for example. Seagram had refused to sell liquor to Kiefer-Stewart unless it agreed to an illegal resale price maintenance scheme. Kiefer-Stewart refused to agree, and as a result was injured by losing access to Seagram's products. See 340 U.S., at 213 .

restrain trade wear grey flannel suits. Businesses controlled by organized crime often attempt to gain control of an industry through violence or intimidation of competitors; in such cases 1 can be applied to separately incorporated businesses which benefit from such tactics, but which may be ultimately controlled by a single criminal enterprise.[24] [467 U.S. 752, 792]

The rule of Yellow Cab and its progeny is not one that condemns every parent-subsidiary relationship. A single firm, no matter what its corporate structure may be, is not expected to compete with itself.[25] Functional integration

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[24] See United States v. Turkette, 452 U.S. 576, 588 -593 (1981) (discussing congressional findings underlying the Organized Crime Control Act of 1970). Section 1 of the Sherman Act has on occasion been used against [467 U.S. 752, 792] various types of racketeering activity. See Hartwell, Criminal RICO and Antitrust, 52 Antitrust L. J. 311, 312-313 (1983); McLaren, Antitrust and Competition - Review of the Past Year and Suggestions for the Future, in New York State Bar Assn., 1971 Antitrust Law Symposium 1, 3 (1971).

[25] See Comment, Decisionmaking, supra n. 9, at 1753-1757; Note, Suggested Standard, supra n. 9, at 735-738. Professor Sullivan elaborates:

> "Picture, at one end of the spectrum, a family business which operates one retail store in each of three or four adjacent communities. All of the stores are managed as a unit by one individual, the founder of the business who sets policy, does all the buying, decides on all the advertising, sets prices, and hires and fires all employees other than family members. The fact that each store is operated by a separate corporation should not convert a family business into a cartel . . . . If there is, as a practical matter, an integrated ownership and management, this small business is a single firm. And a single firm cannot compete with itself.

by its very nature requires unified action; hence in itself it has never been sufficient to establish the existence of an unreasonable restraint of trade: "In discussing the charge in the Yellow Cab case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act." United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948). Restraints that act only on the parent or its subsidiary as a consequence of an otherwise lawful integration do not violate 1 of the Sherman Act.[26] But if the behavior at issue is unrelated to any functional integration between the affiliated corporations and [467 U.S. 752, 793] imposes a restraint on third parties of sufficient magnitude to restrain marketwide competition, as a matter of economic substance, as well as form, it is appropriate to characterize the conduct as a "combination or conspiracy in restraint of trade."[27]

Hence it cannot restrain price competition with itself, or divide markets with itself, or act as a common purchasing agent for itself or otherwise restrain competition with itself, regardless of how many separate corporations the single firm may, for reasons unrelated to the act, be divided into." L. Sullivan, supra n. 9, 114, at 326-327.

[26] Thus, the Court is wrong to suggest, ante, at 771-772, 774-776, and n. 24, that Yellow Cab could reach truly unilateral conduct involving only the employees of a single firm.

[27] If the rule of Yellow Cab and its progeny could be easily circumvented through, for example, use of unincorporated divisions instead of subsidiaries, then there would be reason to question its efficacy as a tool for rational antitrust enforcement. However, the Court is incorrect when it asserts, ante, at 770-771, 772-774, that there is no economic substance in a distinction between unincorporated divisions, which cannot provide a plurality of actors, and wholly owned subsidiaries, which under Yellow Cab can. If that were the case, incorporated subsidiaries

For example, in Yellow Cab the Court read the complaint as alleging that integration had assisted the parent in excluding competing manufacturers from the marketplace, 332 U.S., at 226 -227, leading the Court to conclude that "restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination." Id., at 227. Similarly, in Crescent Amusement the Court noted that corporate affiliation between exhibitors enhanced their buying power and "was one of the instruments in . . . making the conspiracy effective" in excluding independents from the market. 323 U.S., at 189 -190. Thus, in both cases the Court found that the affiliation enhanced the ability of the parent corporation to exclude the competition of third parties, and hence raised entry [467 U.S. 752, 794] barriers faced by actual and potential competitors. When conduct restrains trade not merely by integrating affiliated corporations but rather by restraining the ability of others to compete, that conduct has competitive significance drastically different from procompetitive integration.[28] In these cases, the

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would never be used to achieve integration - the ready availability of an unincorporated alternative would always be employed in order to avoid antitrust liability. The answer is provided by the Court itself - the use of subsidiaries often makes possible operating efficiencies that are unavailable through the use of unincorporated divisions. Ante, at 772-774. We may confidently assume that any corporate parent whose contingent antitrust liability exceeds the savings it realizes through the use of subsidiaries already utilizes unincorporated divisions instead of corporate subsidiaries. Thus, it is more than merely a question of form when a decision is made to use corporate subsidiaries instead of unincorporated divisions, and the rule is not that easily circumvented.

[28] See L. Sullivan, supra n. 9, 114, at 328 ("To have two competitors acting concertedly two separate firms, not just persons, are needed. Thus `concerted action' by two `legal persons' which is limited solely to the internal management of a single firm

affiliation assisted exclusionary conduct; it was not the competitive equivalent of unilateral integration but instead generated power to restrain marketwide competition.

There are other ways in which corporate affiliation can operate to restrain competition. A wholly owned subsidiary might market a "fighting brand" or engage in other predatory behavior that would be more effective if its ownership were concealed than if it was known that only one firm was involved. A predator might be willing to accept the risk of bankrupting a subsidiary when it could not afford to let a division incur similar risks. Affiliated corporations might enhance their power over suppliers by agreeing to refuse to deal with those who deal with an

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does not restrain competition; but `concerted action' by two `legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade"); see also Willis & Pitofsky, supra n. 9, at 38-41. The Attorney General's National Committee to Study the Antitrust Laws made the same point in 1955:

> "The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1. Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated." Attorney General's Committee Report, supra n. 9, at 34.

actual or potential competitor [467 U.S. 752, 795] of one of them; such a threat might be more potent coming from both corporations than from only one.[29]

In this case, it may be that notices to potential suppliers of respondent emanating from Copperweld carried more weight than would notices coming only from Regal. There was evidence suggesting that Regal and Copperweld were not integrated, and that the challenged agreement had little to do with achieving procompetitive efficiencies and much to do with protecting Regal's market position. The Court does not even try to explain why their common ownership meant that Copperweld and Regal were merely obtaining benefits associated with the efficiencies of integration. Both the District Court and the Court of

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29 Professor Sullivan provides another example:

> "[P]icture a parent corporation and its wholly owned subsidiary (or two corporations wholly owned by the same parent or stockholder group) which operate, respectively, a newspaper and a radio station in the same city. If the radio station, which has no local competitors, were to deny advertising to a local business because the latter advertised in a rival newspaper, the integration between the two corporations, however close in terms of ownership or management or both, would not protect them from a charge of conspiracy to restrain trade . . . [T]he concerted action here involved is not merely carrying on the business of a single integrated firm, it is action which is aimed at restraining trade by utilizing such market power as is possessed by the firm because of its radio station in order to erect a competitive barrier in front of a competitor of the firm's newspaper." L. Sullivan, supra n. 9, 114, at 327 (footnote omitted).

Appeals thought that their agreement had a very different result - that it raised barriers to entry and imposed an appreciable marketwide restraint. The Court's discussion of the justifications for corporate affiliation is therefore entirely abstract - while it dutifully lists the procompetitive justifications for corporate affiliation, ante, at 772-774, it fails to explain how any of them relate to the conduct at issue in this case. What is challenged here is not the fact of integration between Regal and Copperweld, but their specific agreement with respect to Independence. That agreement concerned the exclusion of [467 U.S. 752, 796] Independence from the market, and not any efficiency resulting from integration. The facts of this very case belie the conclusion that affiliated corporations are incapable of engaging in the kind of conduct that threatens marketwide competition. The Court does not even attempt to assess the competitive significance of the conduct under challenge here - it never tests its economic assumptions against the concrete facts before it. Use of economic theory without reference to the competitive impact of the particular economic arrangement at issue is properly criticized when it produces overly broad per se rules of antitrust liability;[30] criticism is not less warranted when a per se rule of antitrust immunity is adopted in the same way.

In sum, the question that the Court should ask is not why a wholly owned subsidiary should be treated differently from a corporate division, since the immunity accorded that type of arrangement is a necessary consequence of Colgate. Rather the question should be why two corporations that engage in a predatory course of conduct which produces a marketwide restraint on competition and which, as separate legal entities, can be easily fit within the language of 1, should be immunized

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30 E. g., Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). [467 U.S. 752, 797]

from liability because they are controlled by the same godfather. That is a question the Court simply fails to confront. I respectfully dissent.

U.S. Supreme Court

ALLIED TUBE & CONDUIT CORP. v. INDIAN HEAD, INC., 486 U.S. 492 (1988)

486 U.S. 492
ALLIED TUBE & CONDUIT CORP. v. INDIAN HEAD, INC.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87-157

OPINION

Argued February 24, 1988
Decided June 13, 1988

The National Fire Protection Association - a private organization that includes members representing industry, labor, academia, insurers, organized medicine, firefighters, and government - sets and publishes product standards and codes related to fire protection. Its National Electrical Code (Code), which establishes requirements for the design and installation of electrical wiring systems, is routinely adopted into law by a substantial number of state and local governments, and is widely adopted as setting acceptable standards by private product-certification laboratories, insurance underwriters, and electrical inspectors, contractors, and distributors. Throughout the relevant period, the Code permitted the use of electrical conduit made of steel. Respondent, a manufacturer of plastic conduit, initiated a proposal before the Association to extend Code approval to plastic conduit as well. The proposal was approved by one of the Association's professional panels, and thus could be adopted into the Code by a simple majority of the members attending the Association's 1980 annual meeting. Before the meeting was

held, petitioner, the Nation's largest producer of steel conduit, members of the steel industry, other steel conduit manufacturers, and independent sales agents collectively agreed to exclude respondent's product from the 1981 Code by packing the annual meeting with new Association members whose only function was to vote against respondent's proposal. After the proposal was defeated at the meeting and an appeal to the Association's Board of Directors was denied, respondent brought suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of 1 of the Sherman Act. The jury found petitioner liable, but the court granted a judgment n.o.v. for petitioner, reasoning that it was entitled to antitrust immunity under the doctrine of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 . The Court of Appeals reversed.

Held: Noerr antitrust immunity does not apply to petitioner. Pp. 499-510.

(a) The scope of Noerr protection depends on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint is the result of valid governmental action, as opposed to private action, [486 U.S. 492, 493] those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. In this case, the relevant context is the standard-setting process of a private association without official authority that includes members having horizontal and vertical business relations and economic incentives to restrain competition. Such an association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt its Code, and thus petitioner does not enjoy the

immunity afforded those who merely urge the government to restrain trade. Pp. 499-502.

(b) Nor does Noerr immunity apply to petitioner on the theory that the exclusion of plastic conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Although, because a large number of governments routinely adopt the Code into law, efforts to influence the Association's standard-setting process are arguably the most effective means of influencing legislation regulating electrical conduit, and although Noerr immunity is not limited to "direct" petitioning of government officials, the Noerr doctrine does not immunize every concerted activity that is genuinely intended to influence governmental action. There is no merit to the argument that, regardless of the Association's nonlegislative status, petitioner's efforts to influence the Association must be given the same wide berth accorded legislative lobbying or efforts to influence legislative action in the political arena. Pp. 502-504.

(c) Unlike the publicity campaign to influence legislation in Noerr, petitioner's activity did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but took place within the confines of a private standard-setting process. The validity of petitioner's efforts to influence the Code is not established, without more, by petitioner's literal compliance with the Association's rules, for the hope of the Code's procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An

association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards. At least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. Pp. 505-510.

817 F.2d 938, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., [486 U.S. 492, 494] joined. WHITE, J., filed a dissenting opinion, in which O'CONNOR, J., joined, post, p. 511.

Marvin E. Frankel argued the cause for petitioner. With him on the briefs were Robert M. Heller, Arthur B. Kramer, and Debora K. Grobman.

Fredric W. Yerman argued the cause for respondent. With him on the brief were Michael Malina, Randolph S. Sherman, and Richard A. De Sevo. *

Briefs of amici curiae urging reversal were filed for the State of Illinois by Neil F. Hartigan, Attorney General, and Robert E. Davy, Jr., Assistant Attorney General; and for the Western Fire Chiefs Association et al. by William J. Meeske and Alexander D. Thomson.

Briefs of amici curiae urging affirmance were filed for the United States et al. by Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Cohen, Deputy Assistant Attorney General Starling, Paul J.

Larkin, Jr., Robert B. Nicholson, John J. Powers III, Marion L. Jetton, Robert D. Paul, and Ernest J. Isenstadt; and for the State of Alaska et al. by Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd E. Constantine, Susan Beth Farmer, Elizabeth M. O'Neill, and George W. Sampson, Assistant Attorneys General, Grace Berg Schaible, Attorney General of Alaska, Richard D. Monkmon, Assistant Attorney General, Robert K. Corbin, Attorney General of Arizona, John Steven Clark, Attorney General of Arkansas, Jeffrey A. Bell, Deputy Attorney General, John Van de Kamp, Attorney General of California, Andrea Ordin, Chief Assistant Attorney General, Thomas P. Dove, Deputy Attorney General, Duane Woodard, Attorney General of Colorado, Thomas P. McMahon, First Assistant Attorney General, Joseph I. Lieberman, Attorney General of Connecticut, Robert M. Langer, Assistant Attorney General, Warren Price III, Attorney General of Hawaii, Robert A. Marks, Supervising Deputy Attorney General, Thomas J. Miller, Attorney General of Iowa, John Perkins, Deputy Attorney General, James E. Tierney, Attorney General, of Maine, Stephen L. Wessler, Assistant Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, Michael F. Brockmeyer, Assistant Attorney General, Frank J. Kelley, Attorney General of Michigan, Louis J. Caruso, Solicitor General, Robert C. Ard, Jr., Assistant Attorney General, Hubert H. Humphrey III, Attorney General of Minnesota, Cary Edwards, Attorney General of New Jersey, Laurel A. Price, Deputy Attorney General, Lacy H. Thornburg, Attorney General of North Carolina, Richard H. Carlton, Assistant Attorney General, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave [486 U.S. 492, 495] Frohnmayer, Attorney General of Oregon, LeRoy S. Zimmerman, Attorney General of Pennsylvania, Eugene F. Wayne, Chief Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, Roger A. Tellinghuisen, Attorney General of South Dakota, Jim Mattox, Attorney General of Texas, Mary F. Keller, Executive Assistant

Attorney General, John J. White, Assistant Attorney General, David L. Wilkinson, Attorney General of Utah, Kenneth O. Eikenberry, Attorney General of Washington, John R. Ellis, Deputy Attorney General, Tina Kondo, Assistant Attorney General, Charles G. Brown, Attorney General of West Virginia, Mark D. Kindt, Deputy Attorney General, Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General. [486 U.S. 492, 495]

JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner contends that its efforts to affect the product standard-setting process of a private association are immune from antitrust liability under the Noerr doctrine primarily because the association's standards are widely adopted into law by state and local governments. Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (Noerr). The United States Court of Appeals for the Second Circuit held that Noerr immunity did not apply. We affirm.

I

The National Fire Protection Association (Association) is a private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academia, insurers, organized medicine, firefighters, and government. The Association, among other things, publishes product standards and codes related to fire protection through a process known as "consensus standard making." One of the codes it publishes is the National Electrical Code (Code), which establishes product and performance requirements for the design and installation of electrical wiring systems. Revised every three years, the Code is the most influential electrical code in the nation. A substantial number of state and local governments routinely

adopt the Code into law with little or no change; private certification laboratories, such as Underwriters Laboratories, normally will not list and label [486 U.S. 492, 496] an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

Among the electrical products covered by the Code is electrical conduit, the hollow tubing used as a raceway to carry electrical wires through the walls and floors of buildings. Throughout the relevant period, the Code permitted using electrical conduit made of steel, and almost all conduit sold was in fact steel conduit. Starting in 1980, respondent began to offer plastic conduit made of polyvinyl chloride. Respondent claims its plastic conduit offers significant competitive advantages over steel conduit, including pliability, lower installed cost, and lower susceptibility to short circuiting. In 1980, however, there was also a scientific basis for concern that, during fires in high-rise buildings, polyvinyl chloride conduit might burn and emit toxic fumes.

Respondent initiated a proposal to include polyvinyl chloride conduit as an approved type of electrical conduit in the 1981 edition of the Code. Following approval by one of the Association's professional panels, this proposal was scheduled for consideration at the 1980 annual meeting, where it could be adopted or rejected by a simple majority of the members present. Alarmed that, if approved, respondent's product might pose a competitive threat to steel conduit, petitioner, the Nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent sales agents. They collectively agreed to exclude respondent's product from the

1981 Code by packing the upcoming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal.

Combined, the steel interests recruited 230 persons to join the Association and to attend the annual meeting to [486 U.S. 492, 497] vote against the proposal. Petitioner alone recruited 155 persons - including employees, executives, sales agents, the agents' employees, employees from two divisions that did not sell electrical products, and the wife of a national sales director. Petitioner and the other steel interests also paid over $100,000 for the membership, registration, and attendance expenses of these voters. At the annual meeting, the steel group voters were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communication. Few of the steel group voters had any of the technical documentation necessary to follow the meeting. None of them spoke at the meeting to give their reasons for opposing the proposal to approve polyvinyl chloride conduit. Nonetheless, with their solid vote in opposition, the proposal was rejected and returned to committee by a vote of 394 to 390. Respondent appealed the membership's vote to the Association's Board of Directors, but the Board denied the appeal on the ground that, although the Association's rules had been circumvented, they had not been violated.[1]

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[1] Respondent also sought a tentative interim amendment to the Code, but that was denied on the ground that there was not sufficient exigency to merit an interim amendment. The Association subsequently approved use of polyvinyl chloride conduit for buildings of less than three stories in the 1984 Code, and for all buildings in the 1987 Code.

In October 1981, respondent brought this suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of 1 of the Sherman Act. 26 Stat. 209, 15 U.S.C. 1. A bifurcated jury trial began in March 1985. Petitioner conceded that it had conspired with the other steel interests to exclude respondent's product from the Code and that it had a pecuniary interest to do so. The jury, instructed under the rule of reason that respondent carried the burden of showing that the anticompetitive effects of petitioner's actions outweighed any procompetitive benefits of standard [486 U.S. 492, 498] setting, found petitioner liable. In answers to special interrogatories, the jury found that petitioner did not violate any rules of the Association and acted, at least in part, based on a genuine belief that plastic conduit was unsafe, but that petitioner nonetheless did "subvert" the consensus standardmaking process of the Association. App. 23-24. The jury also made special findings that petitioner's actions had an adverse impact on competition, were not the least restrictive means of expressing petitioner's opposition to the use of polyvinyl chloride conduit in the marketplace, and unreasonably restrained trade in violation of the antitrust laws. The jury then awarded respondent damages, to be trebled, of $3.8 million for lost profits resulting from the effect that excluding polyvinyl chloride conduit from the 1981 Code had of its own force in the marketplace. No damages were awarded for injuries stemming from the adoption of the 1981 Code by governmental entities.[2]

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[2] Although the District Court was of the view that at trial respondent relied solely on the theory that its injury "flowed from legislative action," App. to Pet. for Cert. 31a, the Court of Appeals determined that respondent was awarded damages only on the theory "that the stigma of not obtaining [Code] approval of its products and [petitioner's] `marketing' of that stigma caused independent marketplace harm to [respondent] in those

The District Court then granted a judgment n.o.v. for petitioner, reasoning that Noerr immunity applied because the Association was "akin to a legislature" and because petitioner, "by the use of methods consistent with acceptable standards of political action, genuinely intended to influence the [Association] with respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the [Code]." App. to Pet. for [486 U.S. 492, 499] Cert. 28a, 30a. The Court of Appeals reversed, rejecting both the argument that the Association should be treated as a "quasi-legislative" body because legislatures routinely adopt the Code and the argument that efforts to influence the Code were immune under Noerr as indirect attempts to influence state and local governments. 817 F.2d 938 (1987). We granted certiorari to address important issues regarding the application of Noerr immunity to private standard-setting associations.[3] 484 U.S. 814 (1987).

II

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by Noerr; Mine

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jurisdictions permitting use of [polyvinyl chloride] conduit, as well as those which later adopted the 1984 [Code], which permitted use of [polyvinyl chloride] conduit in buildings less than three stories high. [Respondent] did not seek redress for any injury arising from the adoption of the [Code] by the various governments." 817 F.2d 938, 941, n. 3 (1987) (emphasis added). We decide the case as it was framed by the Court of Appeals.

[3] We also granted certiorari on the issue whether, if not immune under Noerr, petitioner's conduct violated the Sherman Act, but we now vacate our grant of that issue as improvident.

Workers v. Pennington, 381 U.S. 657, 669 -672 (1965); and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. Noerr, 365 U.S., at 136 ; see also Pennington, supra, at 671. In addition, where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. Noerr, supra, at 143. The validity of such efforts, and thus the applicability of Noerr immunity, varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical [486 U.S. 492, 500] and deceptive methods. Noerr, supra, at 140-141. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.[4] California Motor Transport, supra, at 512-513.

In this case, the restraint of trade on which liability was predicated was the Association's exclusion of respondent's product from the Code, and no damages were imposed for the incorporation of that Code by any government. The relevant context is thus the standard-setting process of a private association. Typically, private

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4 Of course, in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. Noerr, 365 U.S., at 144 ; California Motor Transport, 404 U.S., at 511 .

standard-setting associations, like the Association in this case, include members having horizontal and vertical business relations. See generally 7 P. Areeda, Antitrust Law ¶ 1477, p. 343 (1986) (trade and standard-setting associations routinely treated as continuing conspiracies of their members). There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.[5] See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982). Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. See, e. g., ibid.; Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (per curiam). See also FTC v. Indiana Federation of Dentists, [486 U.S. 492, 501] 476 U.S. 447 (1986). When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, cf. Hydrolevel, supra, at 570-573 (noting absence of "meaningful safeguards"), those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to

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5 "Product standardization might impair competition in several ways. . . . [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices." 7 P. Areeda, Antitrust Law § 1503, p. 373 (1986).

apply rule-of-reason analysis to product standard-setting by private associations.[6]

Given this context, petitioner does not enjoy the immunity accorded those who merely urge the government to restrain trade. We agree with the Court of Appeals that the Association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt the Code the Association publishes. 817 F.2d, at 943-944. Whatever de facto authority the Association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707 -708 (1962). See also id., at 706-707; Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 -792 (1975). "We may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." Hallie v. Eau Claire, 471 U.S. 34, 45 (1985). The dividing line between restraints resulting from governmental action and those resulting from private action

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[6] See 2 J. von Kalinowski, Antitrust Laws and Trade Regulation 61.013., 61.03, 61.04, pp. 61-6 to 61-7, 61-18 to 61-29 (1981) (collecting cases). Concerted efforts to enforce (rather than just agree upon) private product standards face more rigorous antitrust scrutiny. See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659 -660 (1961) (per curiam). See also Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941).

[486 U.S. 492, 502] may not always be obvious.[7] But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty concluding that the restraint has resulted from private action.

Noerr immunity might still apply, however, if, as petitioner argues, the exclusion of polyvinyl chloride conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Petitioner notes that the lion's share of the anticompetitive effect in this case came from the predictable adoption of the Code into law by a large number of state and local governments. See 817 F.2d, at 939, n. 1. Indeed, petitioner argues that, because state and local governments rely so heavily on the Code and lack the resources or technical expertise to second-guess it, efforts to influence the Association's standard-setting process are the most effective means of influencing legislation regulating electrical conduit. This claim to Noerr immunity has some force. The effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the 1981 Code into a number of statutes and local ordinances. Nor can we quarrel with petitioner's

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[7] See, e. g., California Motor Transport, supra, at 513 (stating in dicta that "[c]onspiracy with a licensing authority to eliminate a competitor" or "bribery of a public purchasing agent" may violate the antitrust laws); Mine Workers v. Pennington, 381 U.S. 657, 671, and n. 4 (1965) (holding that immunity applied but noting that the trade restraint at issue "was the act of a public official who is not claimed to be a co-conspirator" and contrasting Continental Ore); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-708 (1962); 1 P. Areeda & D. Turner, Antitrust Law ¶ 206 (1978) (discussing the extent to which Noerr immunity should apply to commercial transactions involving the government). See also Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-792 (1975); Continental Ore, supra, at 706-707.

contention that, given the widespread adoption of the Code into [486 U.S. 492, 503] law, any effect the 1981 Code had in the marketplace of its own force was, in the main, incidental to petitioner's genuine effort to influence governmental action.[8] And, as petitioner persuasively argues, the claim of Noerr immunity cannot be dismissed on the ground that the conduct at issue involved no "direct" petitioning of government officials, for Noerr itself immunized a form of "indirect" petitioning. See Noerr (immunizing a publicity campaign directed at the general public on the ground that it was part of an effort to influence legislative and executive action).

Nonetheless, the validity of petitioner's actions remains an issue. We cannot agree with petitioner's absolutist position that the Noerr doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456 -463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the

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[8] The effect, independent of government action, that the 1981 Code had in the marketplace may to some extent have been exacerbated by petitioner's efforts to "market" the stigma respondent's product suffered by being excluded from the Code. See 817 F.2d, at 941, n. 3. Given our disposition infra, we need not decide whether, or to what extent, these "marketing" efforts alter the incidental status of the resulting anticompetitive harm. See generally Noerr, 365 U.S., at 142 (noting that in that case there were. "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers").

conspirators' terms. But see Georgia v. Evans, 316 U.S. 159 (1942). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action. Immunity might even be [486 U.S. 492, 504] claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout. Nor is it necessarily dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection. We thus conclude that the Noerr immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.

Here petitioner's actions took place within the context of the standard-setting process of a private association. Having concluded that the Association is not a "quasi-legislative" body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a "quasi-legislature" and given the same wide berth accorded legislative lobbying. That rounding up supporters is an acceptable and constitutionally protected method of influencing elections does not mean that rounding up economically interested persons to set private standards must also be protected. Nor do we agree with petitioner's contention that, regardless of the Association's nonlegislative status, the effort to influence the Code should receive the same wide latitude given ethically dubious efforts to influence legislative action in the political arena, see Noerr, 365 U.S., at 140-141, simply because the ultimate aim of the effort to influence the private standard-setting process was (principally) legislative action. The ultimate aim is not dispositive. A misrepresentation to a court would not

necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision would be codified - nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action. [486 U.S. 492, 505]

What distinguishes this case from Noerr and its progeny is that the context and nature of petitioner's activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. True, in Noerr we immunized conduct that could be characterized as a conspiracy among railroads to destroy business relations between truckers and their customers. Noerr, supra, at 142. But we noted there:

> "There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry." 365 U.S., at 142 -143.

In light of those findings, we characterized the railroads' activity as a classic "attempt . . . to influence legislation by a campaign of publicity," an "inevitable" and "incidental" effect of which was "the infliction of some direct injury upon the interests of the party against whom the campaign is directed." Id., at 143. The essential character of such a publicity campaign was, we concluded, political, and could not be segregated from the activity's impact on business. Rather, the plaintiff's cause of action simply embraced the inherent possibility in such political fights "that one group or the other will get hurt by the arguments that are made." Id., at 144. As a political activity, special factors counseled against regulating the publicity campaign under the antitrust laws: [486 U.S. 492, 506]

> "Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." Id., at 140-141 (footnote omitted).

In Noerr, then, the political context and nature of the activity precluded inquiry into its antitrust validity.[9]

Here the context and nature of the activity do not counsel against inquiry into its validity. Unlike the publicity campaign in Noerr, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. See supra, at 500. Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the [486 U.S. 492, 507] understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits, see ibid., the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication. The activity at issue here thus cannot, as in Noerr, be characterized as an activity that has traditionally been regulated with extreme caution, see Noerr, 365 U.S., at 141, or as an activity that "bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act," id., at 136. And petitioner did not confine itself to efforts to persuade an independent decisionmaker, cf. id., at 138, 139 (describing the immunized conduct as "mere solicitation"); rather, it organized and orchestrated the actual exercise of the Association's decisionmaking authority in setting a standard. Nor can the setting of the Association's Code be

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[9] Similarly in California Motor Transport any antitrust review of the validity of the activity at issue was limited and structured by the fact that there the antitrust defendants were "us[ing] the channels and procedures of state and federal agencies and courts." 404 U.S., at 511; see also id., at 512-513.

characterized as merely an exercise of the power of persuasion, for it in part involves the exercise of market power. The Association's members, after all, include consumers, distributors, and manufacturers of electrical conduit, and any agreement to exclude polyvinyl chloride conduit from the Code is in part an implicit agreement not to trade in that type of electrical conduit. Cf. id., at 136. Although one could reason backwards from the legislative impact of the Code to the conclusion that the conduct at issue here is "political," we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact. Just as the antitrust laws should not regulate political activities "simply because those activities have a commercial impact," id., at 141, so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact.[10] [486 U.S. 492, 508]

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[10] It is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite [486 U.S. 492, 508] its political impact, and this is itself a case close to the line. For that reason we caution that our decision today depends on the context and nature of the activity. Although criticizing the uncertainty of such a particularized inquiry, post, at 513, the dissent does not dispute that the types of activity we describe supra, at 503-504, could not be immune under Noerr and fails to offer an intelligible alternative for distinguishing those nonimmune activities from the activity at issue in this case. Rather, the dissent states without elaboration that the sham exception "is enough to guard against flagrant abuse," post, at 516, apparently embracing the conclusion of the United States Court of Appeals for the Ninth Circuit that the sham exception covers the activity of a defendant who "genuinely seeks to achieve his governmental result, but does so through improper means." Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458, 465, n. 5 (1987) (emphasis in original). Such a use of the word "sham" distorts its meaning and bears little relation to the

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), is not to the contrary. In that case we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. Id., at 914-915. Here, in contrast, [486 U.S. 492, 509] petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business,

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sham exception Noerr described to cover activity that was not genuinely intended to influence governmental action. 365 U.S., at 144 . See also P. Areeda & H. Hovenkamp, Antitrust Law □ 203.1a, pp. 13-14 (Supp. 1987). More importantly, the Ninth Circuit's approach renders "sham" no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity), thus providing a certain superficial certainty but no real "intelligible guidance" to courts or litigants. Post, at 513. Indeed, the Ninth Circuit concluded that the very activity the dissent deems protected was an unprotected "sham." 827 F.2d, at 465.

stood to reap substantial economic benefits from making it difficult for respondent to compete.[11]

Thus in this case the context and nature of petitioner's efforts to influence the Code persuade us that the validity of those efforts must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process. The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the Association, for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards.[12] The issue of immunity in this case thus collapses into the issue of antitrust liability. Although we do not here set forth the rules of antitrust liability governing the private standard-

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[11] Although the absence of such anticompetitive motives and incentives is relevant to determining whether petitioner's restraint of trade is protected under Claiborne Hardware, we do not suggest that the absence of anticompetitive purpose is necessary for Noerr immunity. As the dissent points out, in Noerr itself the major purpose of the activity at issue was anticompetitive. Post, at 512-513. Our statement that the "ultimate aim" of petitioner "is not dispositive," supra, at 504, stands only for the proposition that, at least outside the political context, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability.

[12] Even petitioner's counsel concedes, for example, that Noerr would not apply if the Association had a rule giving the steel conduit manufacturers a veto over changes in the Code. Tr. of Oral Arg. 41-42.

setting process, we hold that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that [486 U.S. 492, 510] party enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

This conclusion does not deprive state and local governments of input and information from interested individuals or organizations or leave petitioner without ample means to petition those governments. Cf. Noerr, 365 U.S., at 137 -138. See also California Motor Transport, 404 U.S., at 510 . Petitioner, and others concerned about the safety or competitive threat of polyvinyl chloride conduit, can, with full antitrust immunity, engage in concerted efforts to influence those governments through direct lobbying, publicity campaigns, and other traditional avenues of political expression. To the extent state and local governments are more difficult to persuade through these other avenues, that no doubt reflects their preference for and confidence in the nonpartisan consensus process that petitioner has undermined. Petitioner remains free to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-

setting body.[13] And petitioner can avoid the strictures of the private standard-setting process by attempting to influence legislatures through other forums. [486 U.S. 492, 511] What petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), held that the Sherman Act should not be construed to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry. These efforts for the

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[13] The dissent mistakenly asserts that we today hold that Noerr immunity does not apply to mere efforts to persuade others to exclude a competitor's product from a private code. See post, at 514-516. Our holding is expressly limited to cases where an "economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants." Supra, at 509 (emphasis added); see also supra, at 506-507 (relying in part on the distinction between activity involving the exercise of decisionmaking authority and market power and activity involving mere attempts to persuade an independent decisionmaker). Cf. Noerr, 365 U.S., at 136 . The dissent also mistakenly asserts that this description encompasses all private standard-setting associations. See post, at 515. In fact, many such associations are composed of members with expertise but no economic interest in suppressing competition. See, e. g., Sessions, supra, at 461, and n. 2.

most part involved a public relations campaign rather than direct lobbying of the lawmakers and were held not subject to antitrust challenge because of the fundamental importance of maintaining the free flow of information to the government and the right of the people to seek legislative relief, directly or indirectly. Mine Workers v. Pennington, 381 U.S. 657 (1965), and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), applied the rule to efforts to seek executive action and to administrative and adjudicative proceedings.

The Court now refuses to apply the rule of these cases to the participants in those private organizations, such as the National Fire Protection Association (NFPA), that regularly propound and publish health and safety standards for a variety of products and industries and then present these codes to state and local authorities for the purpose of having them enacted into law. The NFPA and those participating in the code-writing process will now be subject to antitrust liability if their efforts have anticompetitive effects and do not withstand scrutiny under the rule of reason. Believing that this result is a misapplication of the Noerr decision and an improvident construction of the Sherman Act, I respectfully dissent. [486 U.S. 492, 512]

This case presents an even stronger argument for immunity than did Noerr itself. That decision turned on whether the design or purpose of the conduct was to obtain or influence the passage or enforcement of laws. The Court concedes that petitioner's actions in this case constituted a "genuine effort to influence governmental action," ante, at 503, and that this was its "ultimate aim," ante, at 504. In Noerr, the publicity campaign was dispersed widely among the public in a broad but necessary diluted attempt to move public opinion in hopes that government officials would take note and respond accordingly. The campaign apparently had some influence on the passage of tax laws

and other legislation favorable to the railroads in New Jersey, New York, and Ohio, and procured the Governor's veto of a bill that had been passed in Pennsylvania. See 365 U.S., at 130; see also 155 F. Supp. 768, 777-801 (ED Pa. 1957). Here, the NFPA actually drafted proposed legislation in the form of the National Electrical Code (NEC) and presented it countrywide. Not only were petitioner's efforts in this case designed to influence the passage of state laws, but there was also a much greater likelihood that they would be successful than was the case in Noerr. This is germane because it establishes a much greater likelihood that the "purpose" and "design" of petitioner's actions in this case was the "solicitation of governmental action with respect to the passage and enforcement of laws," 365 U.S., at 138.

Rather than directly confronting the severe damage that today's decision does to the Noerr doctrine, the majority asserts that the "ultimate aim" of petitioner's efforts "is not dispositive." Ante, at 504. That statement cannot be reconciled with the statements quoted earlier from Noerr, where it was held that even if one of the major purposes, or even the sole purpose, of the publicity campaign was "to destroy the truckers as competitors," 365 U.S., at 138, those actions were immunized from antitrust liability because ultimately they were "directed toward obtaining governmental action," [486 U.S. 492, 513] id., at 140. The majority later doubles back on this statement, and suggests that it is important in this case that "petitioner was at least partially motivated by the desire to lessen competition, and . . . stood to reap substantial economic benefits from making it difficult for respondent to compete." Ante, at 509. It need hardly be said that all of this was also true in Noerr. Nobody condones fraud, bribery, or misrepresentation in any form, and other state and federal laws ensure that such conduct is punishable. But the point here is that conduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when it

is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the Noerr doctrine are established by declaring, and then repeating at every turn, that everything depends on "the context and nature of" the activity, ante, at 504, 505, 506, 509, if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as Noerr itself is reputed to remain good law. One unfortunate consequence of today's decision, therefore, is that district courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.

If there were no private code-writing organizations, and state legislatures themselves held the necessary hearing and wrote codes from scratch, then business concerns like Allied, together with their friends, could jointly testify with impunity about the safety of various products, even though they had anticompetitive motives in doing so. This much the majority concedes, as it does that the major purpose of the code-writing organizations is to influence legislative action. These days it is almost a foregone conclusion that the vast majority of the States will adopt these codes with little or no change. It is untenable to consider the code-writing process by such organizations as the NFPA as too far removed [486 U.S. 492, 514] from the legislative process to warrant application of the doctrine announced in Noerr and faithfully applied in other cases. This was the view of Judge Sneed and his colleagues on the Ninth Circuit in Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458 (1987), and the reasons they gave for applying Noerr in this context are much more persuasive than anything to the contrary the majority now has to offer.

The Court's decision is unfortunate for another reason. There are now over 400 private organizations preparing and publishing an enormous variety of codes and standards. State and local governments necessarily, and as a matter of course, turn to these proposed codes in the process of legislating to further the health and safety of their citizens. The code that is at issue in this case, for example, was adopted verbatim by 25 States and the District of Columbia; 19 others adopted it with only minor changes. It is the most widely disseminated and adopted model code in the world today. There is no doubt that the work of these private organizations contributes enormously to the public interest and that participation in their work by those who have the technical competence and experience to do so should not be discouraged.

The Court's decision today will surely do just that. It must inevitably be the case that codes such as the NEC will set standards that some products cannot satisfy and hence in the name of health and safety will reduce or prevent competition, as was the case here. Yet, putative competitors of the producer of such products will now think twice before urging in the course of the code-making process that those products not be approved; for if they are successful (or even if they are not), they may well become antitrust defendants facing treble-damages liability unless they can prove to a court and a jury that they had no evil motives but were merely "presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body," ante, at 510 (though with the knowing and inevitable result of eliminating competition). In this case, for example, even [486 U.S. 492, 515] if Allied had not resorted to the tactics it employed, but had done no more than successfully argue in good faith the hazards of using respondent's products, it would have inflicted the same damage on respondent and would have risked facing the

same antitrust suit, with a jury ultimately deciding the health and safety implications of the products at issue.

The Court's suggestion that its decision will not affect the ability of these organizations to assist state and local governments is surely wrong. The Court's holding is "that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no Noerr immunity from any antitrust liability flowing from the effects the standard has of its own force in the marketplace." Ante, at 509-510. This description encompasses the structure and work of all such organizations as we now know them. The Court is saying, in effect, that where a private organization sets standards, the participants can be sued under the antitrust laws for any effects those standards have in the marketplace other than those flowing from their adoption into law. But the standards will have some effect in the marketplace even where they are also adopted into law, through publicity and other means, thus exposing the participants to liability. Henceforth, therefore, any private organization offers such standards at its peril, and without any of the breathing room enjoyed by other participants in the political process.

The alternative apparently envisioned by the Court is that an organization can gain the protection of the Noerr doctrine as long as nobody with any economic interest in the product is permitted to "exercis[e] decisionmaking authority" (i. e., vote) on its recommendations as to particular product standards. Insisting that organizations like the NFPA conduct themselves like courts of law will have perverse effects. Legislatures are willing to rely on such organizations precisely because their standards are being set by those who [486 U.S. 492, 516] possess an expert understanding of the products and their uses, which are

primarily if not entirely those who design, manufacture, sell, and distribute them. Sanitizing such bodies by discouraging the active participation of those with economic interests in the subject matter undermines their utility.

I fear that exposing organizations like the NFPA to antitrust liability will impair their usefulness by inhibiting frank and open discussion of the health and safety characteristics of new or old products that will be affected by their codes. The Court focuses on the tactics of petitioner that are thought to have subverted the entire process. But it is not suggested that if there are abuses, they are anything more than occasional happenings. The Court does speculate about the terrible practices that applying Noerr in this context could lead us to condone in future cases, ante, at 503-504, but these are no more than fantasies, since nothing of the sort occurred in the wake of Noerr itself. It seems to me that today's decision is therefore an unfortunate case of overkill.

Of course, the Noerr immunity is not unlimited and by its terms is unavailable where the alleged efforts to influence legislation are nothing but a sham. As the Ninth Circuit held, this limitation is enough to guard against flagrant abuse. In any event, occasional abuse is insufficient ground to render the entire process less useful and reliable. I would reverse the judgment below and remand for further proceedings. [486 U.S. 492, 517]

895 F.2d 352
58 USLW 2505, 1990-1 Trade Case P 68,917
(Cite as: 895 F.2d 352)

United States Court of Appeals,
Seventh Circuit.

Dr. Chester A. WILK, D.C., Dr. James W. Bryden, D.C., Dr. Patricia B. Arthur, D.C., and Dr. Michael D. Pedigo, D.C., Plaintiffs-Appellees, Cross-Appellants,

v.

AMERICAN MEDICAL ASSOCIATION, Defendant-Appellant, Cross-Appellee.

Dr. Chester A. WILK, D.C., Dr. James W. Bryden, D.C., Dr. Patricia B. Arthur, D.C., and Dr. Michael D. Pedigo, D.C., Plaintiffs-Appellees, Cross-Appellants,

v.

AMERICAN MEDICAL ASSOCIATION, Joint Commission on Accreditation of Hospitals, American College of Physicians and American Academy of Orthopaedic Surgeons, Defendants-Cross-Appellees.

Nos. 87-2672, 87-2777.

Argued Dec. 1, 1988.
Decided Feb. 7, 1990.
Rehearing and Rehearing En Banc Denied in No. 87-2672 April 25, 1990.

Chirpractors brought antitrust action against, inter alia, national medical association, hospital accreditation association, and national physicians' association. On remand, 719 F.2d 207, the United States District Court for the Northern District of Illinois, Susan Getzendanner, J., 671 F. Supp. 1465, held that national medical association had

engaged in illegal restraint of trade for which injunctive relief was warranted. On appeal, the Court of Appeals, Manion, Circuit Judge, held that: (1) evidence supported finding that national medical association had engaged in illegal boycott against chiropractors; (2) injunctive relief was warranted; and (3) evidence supported finding that neither hospital accreditation association or national physicians' association were liable.

Affirmed.

Before WOOD, Jr., RIPPLE, and MANION, Circuit Judges.

MANION, Circuit Judge.

The district court held that the American Medical Association ("AMA") violated § 1 of the Sherman Act, 15 U.S.C. § 1, by conducting an illegal boycott in restraint of trade directed at chiropractors generally, and the four plaintiffs in particular. The court granted an injunction under § 16 of the Clayton Act, 15 U.S.C. § 26, requiring, among other things, wide publication of its order. The court held that two additional defendants, the Joint Commission on Accreditation of Hospitals ("JCAH"), and the American College of Physicians ("ACP"), had acted independently of the AMA's boycott, and dismissed them from the case. *Wilk v. American Medical Association*, 671 F. Supp. 1465 (N.D.Ill.1987). The AMA appeals the finding of liability, and contends that, in any event, injunctive relief is unnecessary. Plaintiffs cross-appeal against JCAH and ACP. We affirm.

I.

We have observed before that "antitrust cases are notoriously extended." *Ball Memorial Hospital Inc. v. Mutual Hospital Insurance Inc.*, 784 F.2d 1325, 1333 (7th Cir. 1986).

This case is no exception. Plaintiffs Chester A. Wilk, James W. Bryden, Patricia B. Arthur, and Michael D. Pedigo, are licensed chiropractors. Their complaint, originally filed in 1976, charged several defendants with violating §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. It sought both damages and an injunction. (For a list of all the original defendants, see 671 F. Supp. At 1469-70. We discuss here only those relevant to this appeal.) At the first trial, plaintiffs' primary claim was that the defendants engaged in a conspiracy to eliminate the chiropractic profession by refusing to deal with plaintiffs and other chiropractors. Defendants accomplished this, plaintiffs claimed, by using former Principle 3 of the AMA's Principles of Medical Ethics, which prohibited medical physicians from associating professionally with unscientific practitioners. [FN1] Plaintiffs contended that the AMA used Principle 3 to boycott chiropractors by labeling them "unscientific practitioners," and then advising its members, among others, that it was unethical for medical physicians to associate with chiropractors. According to the plaintiffs, the other defendants joined the AMA's boycott.

FN1. Former Principle 3 provided:

> A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate with anyone who violates this principle.

A jury returned a verdict for the defendants. An earlier panel of this court, however, reversed that judgment. *Wilk v. American Medical Association*, 719 F.2d 207 (7th Cir. 1983) (*Wilk I*). In reversing and ordering a new trial, we held that, in applying the rule of reason, the jury had been allowed to consider factors beyond the effect of the AMA's conduct on competition. The district court had improperly failed to confine the jury's consideration to the "patient care motive

as contrasted with [the] generalized public interest motive." *Id.* at 229.

Just before the 1987 retrial, plaintiffs abandoned their damages claim and sought only injunctive relief. This shifted the case's focus from the past to the present regarding whether plaintiffs were entitled to an injunction under § 16 of the Clayton Act. After a lengthy bench trial, the district court concluded that the AMA, through former Principle 3, had unreasonably restrained trade in violation of § 1 of the Sherman Act. Because the district court adequately detailed the rather lengthy and complex facts of this case, we only briefly summarize them here. (The facts relevant to the claims against JCAH and ACP are set out in section IV of this opinion regarding plaintiffs' cross-appeal.)

In 1963 the AMA formed its Committee on Quackery ("Committee"). The Committee worked diligently to eliminate chiropractic. A primary method to achieve this goal was to make it unethical for medical physicians to professionally associate with chiropractors. Under former Principle 3, it was unethical for medical physicians to associate with "unscientific practitioners." In 1966, the AMA's House of Delegates passed a resolution labelling chiropractic an unscientific cult.

The district court found the AMA's purpose in all of this was to prevent medical physicians from referring patients to chiropractors and from accepting referrals of patients from chiropractors, so as to prevent chiropractors from obtaining access to hospital diagnostic services and membership on hospital medical staffs, to prevent medical physicians from teaching at chiropractic colleges or engaging in any joint research, and to prevent any cooperation between the two groups in the delivery of health care services. Despite the Committee's efforts, chiropractic ultimately became licensed in all 50 states.

In 1977, the AMA's Judicial Council (now known as the Council on Judicial and Ethical Affairs, although we will use its previous name, as did the district court) adopted new opinions which permitted medical physicians to refer patients to chiropractors, as long as the physicians were confident that the services would be performed according to accepted scientific standards. In 1979, the AMA's House of Delegates begrudgingly adopted Report UU, stating that some things chiropractors did were not without therapeutic value; but even so, it stopped short of saying that these services were based on scientific standards. In 1980, the AMA revised its Principles of Medical Ethics, eliminating Principle 3. With this gesture, the district court found, the AMA's boycott ended. 671 F. Supp. at 1477. (We discuss plaintiffs' contention that the boycott continued until 1983 in the section addressing their cross-appeal against JCAH.)

At trial, the AMA raised the so-called "patient care defense" which this court had formulated in its earlier opinion in this case. *Wilk I*, 719 F.2d at 227. That defense required the AMA generally to show that it acted because of a genuine, and reasonable, concern for scientific method in patient care and that it could not adequately satisfy this concern in a way that was less restrictive of competition. The district court rejected the defense. The court found the AMA failed to establish that throughout the relevant period (1966-1980) their concern for scientific methods in patient care had been objectively reasonable. The court also found the AMA similarly failed to show it could not adequately have satisfied its concern for scientific method in patient care in a manner less restrictive of competition than a nationwide conspiracy to eliminate a licensed profession. 671 F. Supp. at 1481-84.

The AMA settled three antitrust lawsuits in 1978, 1980, and 1986 brought by chiropractors, stipulating and agreeing that under the Judicial Council's current opinions, a medical physician could, without fear of discipline or sanction by the AMA, refer a patient to a licensed chiropractor when the physician believed that such a referral would benefit the patient. Similarly, physicians could also choose to accept or decline patients sent to them by chiropractors. The AMA also confirmed that physicians could teach at chiropractic colleges or seminars.

The AMA's present position regarding chiropractic is that it is ethical for a medical physician to professionally associate with chiropractors, if the physician believes that the association is in his patient's best interests. The district court found that the AMA had not previously communicated this position to its membership.

Based on these findings, the court held that the AMA and its members violated § 1 of the Sherman Act by unlawfully conspiring to restrain trade. According to the court, the AMA's boycott's purpose had been to eliminate chiropractic; the boycott had substantial anticompetitive effects; the boycott had no counterbalancing pro-competitive effects; and the AMA's unlawful conduct injured the plaintiffs.

Despite the fact that the district court found the conspiracy ended in 1980, it concluded that the illegal boycott's "lingering effects" still threatened plaintiffs with current injury and ordered injunctive relief. The court concluded that the boycott caused injury to chiropractors' reputations which had not been repaired, and current economic injury to chiropractors. Further, the AMA never affirmatively acknowledged that there are no impediments to professional association and cooperation between chiropractors and medical physicians, except as provided by

law. Thus, chiropractors continued to suffer because the boycott's negative effects (namely, inhibiting AMA members' individual decision-making in their relationships with chiropractors) still remained. The district court believed it was important that the AMA make its members aware of the present AMA position (i.e., it is ethical for medical physicians to professionally associate with chiropractors, if the physician believes it is in the patient's best interest) to eliminate the illegal boycott's lingering effects, and ordered an injunction designed to accomplish that result. 671 F. Supp. at 1507-08 (form of injunction).

II.

A. *Noerr-Pennington Doctrine*

[1] The AMA complains that the district court relied almost entirely on AMA conduct that was protected under the Noerr-Pennington doctrine in finding that it illegally conspired to restrain trade. *Eastern Railroad Presidents' Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); *United Mineworkers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). The Noerr-Pennington doctrine protects businesses and other associations when they join to petition legislative bodies, administrative agencies, or courts for actions having anticompetitive consequences. *Id. See also Wilk I*, 719 F.2d at 229. The doctrine does not, however, protect purely private action, not genuinely aimed at prompting governmental action. *See Allied Tube and Conduit Corp. v. Indian head, Inc.*, 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988).

[2] The AMA contends that its statements regarding chiropractors were either statements about chiropractic's deficiencies or bona fide opinions on matters of public

interest. The district court acknowledged the AMA's claim and, to the extent that the Committee's work regarding influencing legislation on the state and federal levels or in informational activities to inform the public on the nature of chiropractic was involved, it did not consider such conduct in reaching its decision. *Wilk*, 671 F. Supp. at 1473 n. 2. But apart from the protected activity, the district court found substantial evidence of acts aimed at achieving the boycott's goals, not legislative action. *Id.* at 1473-77.

The court found that the AMA, through a resolution recommended by its Board of Trustees, and adopted by its House of Delegates, branded chiropractic "an unscientific cult." 671 F. Supp. at 1473. This implicitly invoked Principle 3's ethical proscription on professional association with chiropractors. Subsequent AMA action, *id.* at 1473-74, made clear the ethical bar on professional association (which included prohibiting medical physicians from referring patients to chiropractors, and from receiving referrals from chiropractors; providing diagnostic, laboratory, or radiology services for chiropractors; and from teaching chiropractors, or practicing together in any manner). The AMA widely circulated these documents. The court also found the Committee had regularly communicated with medical boards and associations, informing them that professional association between medical physicians and chiropractors was unethical. 671 F. Supp. at 1473.

We disagree with the AMA that the district court "repeatedly [cited]" AMA documents which "[focused] entirely on the AMA's 'vigorous educational program' and on 'the necessity to move aggressively against chiropractic in the state legislatures." One such document the AMA points to is an internal AMA memorandum (PX 464, Jt.App. 776-77) from the Committee to the Board of Trustees, discussing the AMA's goal of "the containment of chiropractic and, ultimately, the elimination of chiropractic."

It expressly disavows any intention of using the document publicly. And while the document details some activity that was likely protected, it suggests that activity may have been done only "to minimize the chiropractic argument that the [AMA's] campaign is simply one of economics. . . ." (Jt.App. 777). Also falling outside of the Noerr-Pennington doctrine's protection is an AMA Judicial Council opinion, holding that it was unethical for medical physicians to professionally associate with chiropractors, which was circulated to AMA members and to 56 medical specialty boards (Jt.App. 801-03). Finally, in 1973, the AMA drafted "Standard X," which incorporated the unscientific practitioners' ethical bar into the JCAH accrediting standards. At the AMA's urging, JCAH adopted Standard X.

These activities were not aimed at obtaining legislative action. They were instead aimed at medical physicians and hospitals, cautioning them that it was unethical and indeed dangerous (the obvious inference from receiving health care from an unscientific cult) to associate professionally with chiropractors. In the face of the district court's specific findings on this issue, we cannot say it erred in relying on these activities.

B. *Unreasonable Restraint of Trade*

[3][4] The central question in this case is whether the AMA's boycott constituted an unreasonable restraint of trade under § 1 of the Sherman Act. A restraint is unreasonable if it falls within the category of restraints held to be per se unreasonable, or if it violates what is known as the "Rule of Reason." *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 457-58, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986); *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct.

1355 (1978). Restraints that are per se unreasonable include agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry or restraint is needed to establish their illegality. *Nat'l. Society of Professional Engineers*, 435 U.S. at 692. Concerted refusals to deal, described as group boycotts, typically are held unlawful *per se*. *See Indiana Federation of Dentists*, 476 U.S. at 458; *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 290 (5th Cir. 1988). The per se rule avoids a burdensome inquiry into actual market conditions where the likelihood of anticompetitive effect is so obvious that the costs of determining whether the particular restraint at issue involves anticompetitive conduct is unwarranted. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15-16 n. 25, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). In contrast, the rule of reason category includes agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business involved, the particular restraint's history, and the reasons it was imposed. *Nat'l. Society of Professional Engineers*, 435 U.S. at 692. The test of legality under the rule of reason is whether the challenged conduct promotes or suppresses competition. *Id.* at 691; *see also Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918). The purpose of both approaches (*per se* or rule of reason) is to decide the restraint's competitive significance.

The Supreme Court historically has been slow to condemn rules adopted by professional associations as unreasonable *per se*. *Indiana Federation of Dentists*, 476 U.S. at 458. The Court is also reluctant to extend the *per se* rule to restraints imposed in the context of business relationships where a practice's economic impact is not immediately apparent. *Id.* Likewise, judicial inexperience with a particular arrangement cautions against extending the *per se* approach's reach insofar as judging the alleged restraint's lawfulness under the antitrust laws. *NCAA v. Board of*

Regents, 468 U.S. at 100 n.21; *see also Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982); *Consolidated Metal Products*, 846 F.2d at 290. Nevertheless, the Supreme Court has not refrained from applying the *per se* approach solely on the grounds that the judiciary has little antitrust experience in the particular industry. *See Arizona v. Maricopa County Medical Society*, 457 U.S. at 349-51 (health care industry).

[5] As a general rule, § 1 claims under the Sherman Act should be evaluated under the rule of reason unless the challenged action falls into the category of agreements which are deemed so harmful in their effect on competition so as to be conclusively presumed to be unreasonable and thus illegal without a detailed inquiry as to the precise harm they are alleged to have caused. *Northwest Wholesale Stationers*, 472 U.S. at 289-90; *Consolidated Metal Products*, 846 F.2d at 289-90. In this court's first go-round with this case, it held that the AMA's alleged boycott should be measured under the rule of reason. *Wilk I*, 719 F.2d at 221-22. We held that in the context of a learned profession, the nature and extent of the restraint's anticompetitive effect was too uncertain to warrant *per se* treatment. *Id.* at 221. Moreover, we looked to the Supreme Court's decisions involving professional associations (*e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 ; *Nat'l. Society of Professional Engineers*, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 ; and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)), and noted the pains the Court had taken to carve out the possibility that a practice which might violate the Sherman Act in another context might not violate the Act when a learned profession was involved. *Wilk I*, 719 F.2d at 222. Thus, we concluded, "[a] canon of medical ethics purporting, surely not frivolously, to address the importance of scientific

method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment." *Id.*

On appeal, plaintiffs urge that we change course and apply instead the *per se* rule. Plaintiffs claim that the Supreme Court's decisic in *Indiana Federation of Dentists and Northwest Wholesa.. Stationers* undercut our prior decision to treat this case under the rule of reason. But like the district court, we decline plaintiffs' invitation to revisit this issue. The Court in *Indiana Federation of Dentists* did not itself apply a *per se* rule. Nor do we read either case as requiring us to employ the *per se* analysis on the facts of this case. And, in any event, even under the rule of reason, the boycott was unlawful. *Cf. Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 826 F.2d 712, 720-21 (7th Cir. 1987) (because jury had concluded that the challenged action -- an alleged tying arrangement -- had unreasonably restrained competition, and had found liability under the rule of reason, it was unnecessary to decide the case under the *per se* inquiry).

[6][7] The threshold issue in any rule of reason case is market power. *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 398 (7th Cir. 1989); *Valley Liquors, Inc. v. Renfield Importers Ltd.*, 822 F.2d 656, 666 (7th Cir. 1987) (*Valley II*). Market power is the ability to raise prices above the competitive level by restricting output. *NCAA v. Board of Regents*, 468 U.S. at 109 n. 38; *Ball Memorial Hospital*, 784 F.2d at 1331. Whether market power exists in an appropriately defined market is a fact-bound question, and appellate courts normally defer to district court findings on that issue. *Jefferson Parish Hospital*, 466 U.S. at 42 (O'Connor, J., concurring). Here, the district court found the relevant market to be the provision of health care services to the American public nationwide, particularly care for the treatment of musculoskeletal problems. 671 F. Supp. at 1478. Several facts demonstrated the AMA's market power within

the health care services market. AMA members constituted a substantial force in the provision of health care services in the United States and they constituted a majority of medical physicians. AMA members received a much greater portion of fees paid to medical physicians in the United States than non-AMA members. *Id.* The evidence showed that AMA members received approximately 50% of all fees paid to health care providers. Finally, according to plaintiffs' expert, the AMA enjoyed substantial market power. The district court also found there was substantial evidence that the boycott adversely affected competition, and that a showing of such adverse effects negated the need to prove in any elaborate fashion market definition and market power, relying on *Indiana Federation of Dentists*, 476 U.S. at 460-62, 106 S. Ct. at 2018-20.

The AMA first contests the district court's finding of market power. It challenges the court's reliance on market share evidence as a basis to find market power and the district court's lumping together all AMA members as a group in assessing market share as a basis for its market power finding. We are not convinced the trial court erred. The district court properly relied on the AMA membership's substantial market share in finding market power. While we cautioned against relying solely on market share as a basis for inferring market power in *Ball Memorial Hospital*, 784 F.2d at 1336, we did not rule out that approach. *Id. See also Parts and Electric Motors*, 826 F.2d at 720 n. 7; *Valley II*, 822 F.2d at 666-67. This is especially so where there are barriers to entry and no substitutes from the consumer's perspective. *Ball Memorial Hospital*, 784 F.2d at 1336. Here the district court found the AMA membership was a substantial force in the American health care market, and that there were substantial barriers to the entry of new chiropractors into the field, such as substantial education requirements, 671 F. Supp. at 1479.

The district court also relied on substantial evidence of adverse effects on competition caused by the boycott to establish the AMA's market power. In *Indiana Federation of Dentists,* the Supreme Court explained that since "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" 476 U.S. at 460-61, 106 S. Ct. at 2018-19, quoting 7 P. Areeda, *Antitrust Law* ¶. 1511, p. 429 (1986). *See also,* P. Areeda, *The Rule of Reason -- A Catechism on Competition,* 55 Antitrust Law Journal 571, 577 (1986). Thus, the district court recited the boycott's anticompetitive effects:

> It is anticompetitive and it raises costs to interfere with the consumer's free choice to take the product of his liking; it is anticompetitive to prevent medical physicians from referring patients to a chiropractor; (Lynk -- 1427-28) it is anticompetitive to impose higher costs on chiropractors by forcing them to pay for their own x-ray equipment rather than obtaining x-rays from hospital radiology departments or radiologists in private practice; and it is anticompetitive to prevent chiropractors from improving their education in a professional setting by preventing medical physicians from teaching or lecturing to chiropractors. (Tr. 1409-22, 1424-31.)

671 F. Supp. at 1478-79. See also Wilk I, 719 F.2d at 214. These findings eliminated the need for an inquiry into market power.

[8] The AMA's attempts to discredit the evidence the district court relied on to find anticompetitive effects are unavailing. The record does not show, as the AMA

contends, that forcing chiropractors to purchase their own x-ray equipment had no adverse effect on chiropractors. And the district court did not clearly err in finding that former Principle 3 reduced demand for chiropractic services simply because there was evidence that a patient had seen a chiropractor before and after having seen a medical physician. Moving on, the AMA argues that even if market power existed, it escapes liability under the rule of reason because former Principle 3 had overriding pro-competitive effects. The AMA's argument is not unpersuasive in the abstract; but unfortunately it relies on evidence which the district court rejected as "speculative." 671 F. Supp. at 1479. Essentially, the AMA argues that the market for medical services is one where there is "information asymmetry." In other words, health care consumers almost invariably lack sufficient information needed to evaluate the quality of medical services. This increases the risk of fraud and deception on consumers by unscrupulous health care providers possibly causing what the AMA terms "market failure": consumers avoiding necessary treatment (for fear of fraud), and accepting treatment with no expectation of assured quality. The AMA's conduct, the theory goes, ensured that physicians acquired reputations for quality (in part, by not associating with unscientific cultists), and thus allowed consumers to be assured that physicians would use only scientifically valid treatments. This in effect simultaneously provided consumers with essential information and protected competition.

Getting needed information to the market is a fine goal, but the district court found that the AMA was not motivated solely by such altruistic concerns. Indeed, the court found that the AMA intended to "destroy a competitor," namely, chiropractors. It is not enough to carry the day to argue that competition should be eliminated in the name of public safety. *See Nat'l. Society of Professional Engineers*, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355.

But the AMA persists in arguing that pro-competitive effects were achieved by the boycott through what its expert called "nonverbal communication." In rejecting this argument, the district court stated that the AMA's expert's

> theory is that the boycott constituted nonverbal communication which informed consumers about the differences between medical physicians and chiropractors, and that this had a pro-competitive effect. (Tr. 1411-12.) I reject this opinion as speculative. (Tr. 1434-43.) Mr. Lynk [William J. Lynk, the AMA's expert] neither conducted nor read any studies regarding the efficacy of such nonverbal communications. *Id.* He neither conducted nor read any surveys of consumer opinion to determine whether consumers were confused about the differences between medical physicians and chiropractors. (*Id.*) I saw no evidence of any such confusion during the trial. Mr. Lynk's opinion does not accord with common sense. A nationwide conspiracy intended by its participants to contain and eliminate a licensed profession cannot be justified on the basis of Mr. Lynk's personal opinion that it was pro-competitive, nonverbal communication to consumers.

671 F. Supp. at 1479. We find the district court's reasoning compelling.

The AMA, however, argues that the district court missed the boat in rejecting Mr. Lynk's theory. The relevant question, according to the AMA, is not whether consumers would perceive any differences between physicians and chiropractors today; rather, it is whether they would ever view a physician's *referral* of a patient to a chiropractor as a physician's endorsement of the chiropractor's practices. But

the AMA misses the essence of the district court's ruling. The trial court rejected the AMA's theory as speculative because Lynk neither conducted nor read any studies regarding nonverbal communications; his views were only his "personal opinion." 671 F. Supp. at 1479. In fact, Lynk testified that an empirical study could not even be performed to determine the pro-competitive effects of Principle 3. (Jt.App. at 351-52.) Thus, even if the AMA is right in asserting that the relevant inquiry is how a physician's referral would be viewed by the consumer, there was no underlying study or data to support its theory.

Moreover, Lynk's testimony did not bear out the AMA's assertions regarding the "relevant question." The AMA says that it is irrelevant to its theory whether health care consumers perceive any differences between chiropractors and medical physicians, and that Lynk's testimony went to the role of reputation and information in health care service markets. But in testifying as to the pro-competitive function of standards generally, Lynk testified that they improve consumer information by making it possible for consumers to make more informed choices "about what it is they are getting from alternative sellers of the same or substitute products to the extent that it allows them to make better choices." (Jt.App. 343.) Lynk also testified that one of the interests served by former Principle 3 was that it would clarify the distinctions between the profession of medicine and alternative professions "that are not based on medical science but which can create the appearance that they are." (Jt.App. 351.) This seems to go precisely to the perceived differences between chiropractors and medical physicians.

In sum, we agree with the district court that the AMA's boycott constituted an unreasonable restraint of trade under § 1 of the Sherman Act under the rule of reason. Therefore, the district court's findings that the AMA's boycott was anticompetitive, and was not counter-balanced by any pro-

competitive effects were not erroneous. *Nat'l. Society of Professional Engineers*, 435 U.S. at 691.

C. *Patient Care Defense*

In the AMA's first appeal, we modified the rule of reason to allow the AMA to justify its boycott of chiropractors if it could show that it was motivated by a concern for "patient care." *Wilk I*, 719 F.2d at 227. We were persuaded that measuring former Principle 3's reasonableness required a more flexible approach than the traditional rule of reason inquiry provided. *Id.* at 226-27. Thus, we explained that if plaintiffs met their burden of persuasion on remand by showing that former Principle 3 and the implementing conduct had restricted competition rather than promoting it, the burden of persuasion would shift to the defendants to show:

> (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.
>
> *Id.* at 227.

In this appeal, plaintiffs ask us to reconsider the patient care defense, urging that three subsequent Supreme Court decisions have implicitly rejected it; *see Patrick v. Burget*, 486 U.S. 94, 104-05, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988); *Indiana Federation of Dentists*, 476 U.S. at 458-60; and *Jefferson*

Parish Hospital Dist. No. 2, 466 U.S. at 25 n. 41. While these decisions may cast doubt on the patient care defense's continuing vitality, they did not address the specific issue of whether the patient care defense on the facts in this case would be allowed. While we acknowledge that there has been some academic criticism of the defense (*see Kissam Antitrust Boycott Doctrine*, 69 Iowa L. Rev. 1165, 1214-16 (1984); Havighurst, *Doctors and Hospitals; An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071, 1103 n. 101 (1984)), we need not revisit the issue because the district court's finding that the AMA did not satisfy its burden of persuasion under the defense was not clearly erroneous.

The district court held that the AMA failed to meet the defense's second and fourth elements: that its concern for scientific method in patient care was objectively reasonable, and that the concern for scientific method in patient care could not have been satisfied adequately in a manner less restrictive of competition, respectively. While only those two rulings are at issue, it is useful to summarize the district court's treatment of the entire defense.

Although doubting the AMA's genuineness regarding its concern for scientific method in patient care, the district court concluded that the AMA established that element. While it was attacking chiropractic as unscientific, the AMA simultaneously was attacking other unscientific methods of disease treatment (e.g., the Krebiozen treatment of cancer), and, as the district court noted, the existence of medical standards or guidelines against unscientific practice was relatively common. 671 F. Supp. at 1481. The court, however, found that the AMA failed to carry its burden of persuasion as to whether its concern for scientific method in patient care was objectively reasonable.

The court acknowledged that during the period that the Committee on Quackery was operating, there was plenty of material supporting the belief that all chiropractic was unscientific. But, according to the court (and this is unchallenged), at the same time, there was evidence before the Committee that chiropractic was effective, indeed more effective than the medical profession, in treating certain kinds of problems, such as back injuries. The Committee was also aware, the court found, that some medical physicians believed chiropractic could be effective and that chiropractors were better trained to deal with musculoskeletal problems than most medical physicians. Moreover, the AMA's own evidence suggested that at some point during its lengthy boycott, there was no longer an objectively reasonable concern that would support a boycott of the entire chiropractic profession. Also important was the fact that "it was very clear" that the Committee's members did not have open minds to pro-chiropractic arguments or evidence. 671 F. Supp. at 1481-83.

Next, the court found that the AMA met its burden in establishing that its concern about scientific method was the dominant motivating factor for promulgating former Principle 3, and in the conduct undertaken and intended to implement it. 671 F. Supp. at 1483. But even so, the court acknowledged there was evidence showing that the AMA was motivated by economic concerns, as well

Finally, the court concluded that the AMA failed to meet its burden in demonstrating that its concern for scientific method in patient care could not have been satisfied adequately in a manner less restrictive of competition. The court stated that the AMA had presented no evidence of other methods of achieving their objectives such as public education or any other less restrictive approach. 671 F. Supp. at 1483.

[9] The AMA attacks the district court's findings as to the second element (concern for scientific method as objectively reasonable), claiming that the court rewrote the element to require the AMA to show its concern with chiropractic (rather than with scientific patient care) was objectively reasonable. *Wilk*, 671 F. Supp. at 1481. We disagree. The AMA's claim in passing that the court "[misconceived]" the defense is barely explained in one of its 67 footnotes; but in any event, we think the district court was true to the defense and adequately supported its holding with several key factual determinations. It recited the evidence directly at odds with the AMA's belief that all chiropractic was unscientific. 671 F. Supp. at 1481-83. The AMA does not challenge the district court's findings, so those findings must stand. Beyond that, the AMA reads this element too rigidly. The issue here is whether its concern for scientific method in the care of patients was objectively reasonable. In the context of this particular case, then, the question is whether that concern justified a boycott of chiropractic. Based on the undisputed facts, it did not.

The AMA's challenge to the fourth element (concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition) is equally unpersuasive. The AMA completely fails to offer any evidence to support its burden. Instead, it argues that its former guideline had at most a de minimis effect on chiropractors' costs, and thus could not be treated as an attempt to contain and eliminate the entire chiropractic profession. This, however, ignores the fact that the AMA's self-proclaimed and described "mission" was to contain, and ultimately eliminate chiropractic. (Jt. App. 776.) The AMA participated in a nationwide boycott and conspiracy designed to contain and eliminate a profession that was licensed in all fifty states at the time the Committee on Quackery was disbanded. As the district court held, it is "a difficult task" to argue that this was "the only way to

satisfy the AMA's concern for the use of scientific method in patient care." 671 F. Supp. at 1483. Furthermore, we reject the AMA's attempts to minimize the effect its boycott had on competition. The district court found the boycott had several anticompetitive effects, such as raising costs by interfering with consumers' free choice, which are unrefuted. 671 F. Supp. at 1478-79, 1480. [FN2]

FN2. The AMA;s assertion that former Principle 3 operated to prevent the "free-riding" that would have occurred if physicians had referred patients to chiropractors misses the mark. Apparently, the AMA believes that if physicians were forced to refer patients to chiropractors, chiropractors would benefit (the "free ride") from the physicians' reputation for providing quality medical service, without necessarily deserving that reputation themselves. But neither this court nor the district court would require the AMA to endorse chiropractic, nor do we mandate that there be referrals. We simply speak to the restraint on professional association, and say that physicians, hospitals, and other institutions must be free to make their own uncoerced decisions on whether to professionally associate with chiropractors. We do not compel medical physicians to praise or sponsor chiropractors' work. *See Schachar v. American Academy of Ophthalmology*, 870 F.2d 397, 399 (7th Cir. 1989). We do not even require "cooperation or friendliness." *Id.* We also note that the AMA apparently misconceives the role of the free-riding analysis in antitrust law. *See Premier Electrical Construction Co. v. National Electrical Contractors Ass'n Inc.*, 814 F.2d 358, 368-70 (7th Cir. 1987) (explaining the concept).

D. *Antitrust Injury*

[10] To seek an injunction under § 16 of the Clayton Act, a private plaintiff must allege "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 113, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986) (*quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)). Here, the district court concluded that plaintiffs had shown the kind of injury the antitrust laws were designed to prevent. 671 F. Supp. at 1479-80. Plaintiff's economic expert (Stano) compared chiropractors' incomes with podiatrists' and optometrists' incomes (comparable limited license practitioners) over the relevant period of time and concluded that chiropractors' incomes had been lower than both. This Styno viewed as consistent with plaintiffs' boycott theory. He also concluded that a jump in chiropractors' incomes during the 1978-1980 period was consistent with the acknowledged lessening of the boycott by the AMA during that time. Lynk, the AMA's economic expert, though he faulted the data plaintiffs' expert relied upon, agreed that if he were to compare chiropractors' incomes to comparable groups, he also would include podiatrists and optometrists (although he stated he would seek further explanations for differences between the groups' incomes). In the district court's view, further support for plaintiffs' theory of harm was the "very strong evidence of a pervasive, nationwide, effective conspiracy which by its very nature would have affected the demand curve for chiropractic services and adversely affected the income of chiropractors." 671 F. Supp. at 1480. Finally, the district court added, there was evidence of injury to reputation suffered by chiropractors. (Both economic experts, according to the court, believed that injury to reputation would constitute an anticompetitive effect of the boycott.)

The AMA argues that plaintiffs failed to establish an antitrust injury. Essentially the argument goes somewhat like this. This case is not a class action; rather, it involves only the four named plaintiffs. The only harm here would have been to "scientific" chiropractors. Because, according to the AMA (but not the district court), plaintiffs were not and are not "scientific practitioners," they could not have suffered any injury from former Principle 3. If any chiropractors could establish antitrust injury, it would be those who have "renounced the theory of sublaxations and limit their practices to conservative physical therapy modalities." The AMA's argument thus hinges on its lengthy assertion that the four plaintiffs are "unscientific practitioners." The problem with this approach, however, is that the district court did not agree with the AMA that the plaintiffs were "unscientific" practitioners. Although the court acknowledged that there was some evidence that the plaintiffs did not use common methods in treating common symptoms, and that the treatment of patients appeared to be undertaken on an ad hoc rather than on a scientific basis, it did not go so far as the AMA believes, and establish or find that the plaintiffs in this case were "unscientific practitioners." Indeed, it expressly held that no one involved in the case, including the plaintiffs, believed that chiropractic treatment should be used for treatment of diseases such as cancer, diabetes, heart disease, high blood pressure, and infections. 671 F. Supp. at 1482. Regardless, neither the district court, nor this court is equipped to determine whether chiropractic is "scientific" or not. So the AMA's argument must fail in any event. We see the AMA's argument here as yet another invitation to tackle the question of whether chiropractic is "either good or bad, efficacious or deleterious, quackery or science." 671 F. Supp. at 1481. The district court repeatedly stated it was not deciding whether chiropractic was scientific. 671 F. Supp. 1482 n. 8, 1482-83, 1506-07. Yet both sides (below it was

plaintiffs, 671 F. Supp. at 1482; here, it is the AMA) continue to color their arguments with how they view their own, or the other side's, profession. Like the district court, we do not see our task as deciding whether or not chiropractic is scientific.

The AMA also quibbles with the evidence of antitrust injury. The district court rejected the same arguments. 671 F. Supp. at 1480. We too are unpersuaded. The AMA offers no good reason why we should accept its expert's opinion over that of the plaintiffs', and we decline to do so. But beyond that, the district court relied on more than just plaintiffs' expert in determining there was an antitrust injury. It also relied on the evidence of the "pervasive, nationwide, effective conspiracy which by its very nature would have affected the demand curve for chiropractic services and therefore adversely affected income of chiropractors." 671 F. Supp. at 1480. (Further, we also note that the AMA is far too generous in its characterization of plaintiffs' expert's "concession" that the AMA's conduct was "lawful and pro-competitive.")

The evidence established that all chiropractors' incomes were lower than those of comparable limited license practitioners. And the evidence was that all chiropractors suffered an injury to their reputation. 671 F. Supp. at 1480. Indeed, the district court found that the individual plaintiffs suffered rejections and lost opportunities and that "the individual plaintiffs have been personally harmed, and continue to be personally threatened, by a lack of association with members of the AMA caused by the boycott and the lingering effects of the boycott." 671 F. Supp. at 1486. Moreover, the court stated that "[the] activities of the AMA undoubtedly have injured the reputation of chiropractors generally. This kind of injury more likely than not was sustained by the four plaintiffs." Id. This directly refutes the

AMA's contention that there was nothing but a showing of "classwide injury." [FN3]

FN3. The AMA cites *United States v. Borden Co.*, 347 U.S. 514, 74 S. Ct. 703, 98 L. Ed. 903 (1954), for the proposition that a showing of classwide injury is insufficient to support injunctive relief for an individual plaintiff. While that might be true, *Borden* does not say so. There, the Supreme Court held that in light of the differences in the interests sought to be vindicated by the government and by private litigants in actions under the Clayton Act, the government was not precluded from obtaining injunctive relief against price discrimination simply because, in an earlier private action, a decree enjoined the conduct in question. At any rate, the trial court here relied on more than evidence of "classwide injury" in finding that these four plaintiffs were injured by the AMA's unlawful boycott.

III.

Entitlement To Injunctive Relief

Section 16 of the Clayton Act provides that:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . .

15 U.S.C. § 26. Although the district court concluded that the AMA's boycott ended in 1980 (when former Principle 3 was eliminated), it held that an injunction nevertheless was necessary in this case.

The trial court concluded there were lingering effects of the AMA's conspiracy; that the AMA never acknowledged the lawlessness of its past conduct, and in fact continued to maintain that it had always been in compliance with the antitrust laws; that the AMA had never affirmatively stated that it was ethical for medical physicians to professionally associate with chiropractors; that the AMA had never publicly stated to its members the admissions made in the trial court about chiropractic's improved nature, despite the fact that the AMA currently claims that it made changes in its policy in recognition of chiropractic's change and improvement; that the AMA never publicly retracted articles such as "The Right and Duty of Hospitals to Deny Chiropractor Access to Hospitals"; that a medical physician had to read very carefully the current AMA Judicial Council opinions to realize that there had been a change in the treatment of chiropractors; and, finally, that the AMA's systematic, long-term wrongdoing and long-term intent to destroy chiropractic "[suggested]" that an injunction was appropriate. 671 F. Supp. at 1488. The court believed that it was important to make AMA members aware of the AMA's present position -- that it is ethical for medical physicians to professionally associate with chiropractors, if the physician believes it is in his patient's best interest -- to eliminate the unlawful boycott's lingering effects. The injunction, then, is to "assure that the AMA does not interfere with the right of a physician, hospital or other institution to make an individual decision on the question of professional association." 671 F. Supp. at 1507.

The injunction requires the AMA to arrange publication of the district court's order in the *Journal of the American Medical Association*, mail the order to each of the AMA's members, and revise the current opinions of the AMA's Council on Judicial and Ethical Affairs (formerly the Judicial Council) so that it states the AMA's present position on chiropractic in a separate provision, with a heading and index references referring to chiropractors. 671 F. Supp. at 1507-08.

[11] The AMA correctly points out that the district court wrongly placed the burden of proof on the AMA in deciding whether injunctive relief was appropriate in this case. But the AMA does not argue how, if at all, the court's error prejudiced it. We do not think the AMA was prejudiced.

The district court treated the AMA's argument in this respect as an argument that the claim for injunction was moot instead of an argument that no injunctive relief was necessary. Although these concepts are similar, they are analytically distinct, and a court could find that a case is not moot yet deny injunctive relief. *See United States v. Concentrated Phosphate Export Association, Inc.*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968); *U.S. v. W.T. Grant*, 345 U.S. 629, at 633, 73 S. Ct. 894, at 898, 97 L. Ed. 1303 (1953); *TRW, Inc. v. Federal Trade Commission*, 647 F.2d 942, 953-54 (9th Cir. 1981); *SCM Corporation v. Federal Trade Commission*, 565 F.2d 807, 812 (2d Cir. 1977). There are practical differences between the concepts, as well. The mootness burden is a heavy one, and the *defendant* must show that there is no reasonable expectation that the wrong will be repeated. By contrast, the burden for showing whether injunctive relief is necessary is on the *moving party;* here plaintiffs. The district court wrongly placed the burden of persuasion on the AMA. 671 F. Supp. at 1484. But no matter which party bore the burden on this issue, the district

court's ultimate findings leave no doubt that injunctive relief was appropriate.

A party moving for an injunction must show some cognizable danger of recurrent violation, that is, something more than the mere possibility which serves to keep the case alive. *W.T. Grant*, 345 U.S. at 633, 73 S. Ct. at 898. "To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *Id.* Courts require "clear proof" that an unlawful practice has been abandoned, and must guard against attempts to avoid injunctive relief "by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption." *U.S. v. Oregon State Medical Society*, 343 U.S. 326 at 333, 72 S. Ct. 690, at 695, 96 L. Ed. 978 (1952). These issues are committed to the trial court's discretion. *Id.* 345 U.S. at 634, 73 S. Ct. 898; *see also U.S. v. Concentrated Phosphate*, 393 U.S. at 203-04, 89 S. Ct. at 364. Thus, we will not substitute our judgment for the district court's. The question is not how we would rule if we were addressing the question in the first instance. Rather, the question is whether the district court's decision was reasonable. *See United States v. United States Currency in the Amount of $103,387.27*, 863 F.2d 555, 561 (7th Cir. 1988).

[12] We believe the court's decision was reasonable. It found a cognizable danger of recurrent violations, was unimpressed with the AMA's expressed intent to comply with antitrust laws, was unpersuaded by the effectiveness of the AMA's discontinuance of its boycott, and properly considered the systematic and long-term nature of the boycott. *W.T. Grant*, 345 U.S. at 633, 73 S. Ct. at 897.

The AMA characterizes many of its challenges to the district court's decision to order an injunction as attacks on the court's findings of fact. Thus, for example, the AMA argues that the district court "erroneously found a risk of recurrence." But the facts are relatively undisputed. The AMA is really challenging the district court's decision that those facts supported an injunction.

In this regard, the district court found that the AMA's behavior in connection with the 1983 revision of the JCAH accreditation standards for hospitals indicated the AMA's likelihood of returning to its old (anti-chiropractic) ways. (The facts surrounding the 1983 revisions are set out more fully in section IV below, in connection with plaintiffs' cross appeal against JCAH.) The AMA's original position toward those standards was favorable to chiropractors in that it supported the JCAH position that each hospital be permitted to decide for itself, under applicable state law, which licensed health care providers would be allowed hospital privileges and membership on the medical staff. However, after an outcry from its membership the AMA was forced to change its original position to satisfy its constituents, namely, medical physicians; it thus sought to have JCAH approve a more restrictive accreditation standard which would ensure medical and osteopathic physicians control of the medical staff and patient care in hospitals. 671 F. Supp. at 1476, 1488. This incident led the trial court to conclude that the AMA's "present assurances [were] good only until the next chiropractic battle." *Id.* at 1488.

The facts surrounding the 1983 JCAH revisions are not in dispute. Even so, the AMA terms the district court's reliance on this incident as "baffling." Thus, it contends that even under the district court's injunction order it will still be allowed to urge restrictions on chiropractors before recognized accrediting bodies, and that its conduct

regarding the JCAH standards would be consistent with that mandate. The AMA also argues that the district court's conclusion that the JCAH's 1983 revision was reasonable, indeed proper, validates the AMA's call to action to ensure medical and osteopathic physician control of medical staff and patient care. We disagree.

While the AMA, under the district court's order, may in the future be free to urge restrictions or take positions with respect to chiropractic, the AMA's action with respect to the 1983 JCAH revisions must be viewed in the context in which it occurred. It came on the heels of a lengthy illegal boycott of chiropractors. And although the AMA believed the JCAH's initial standards were consistent with the then current antitrust legal climate, it was unable to maintain its position in the face of a barrage of criticism from its members. 671 F. Supp. at 1476-77. That coupled with the fact that the district court found the AMA even through the date of trial continued to respond to requests for information on chiropractic by sending out anti-chiropractic literature, *id.*, was enough for the district court properly to conclude that there was evidence that suggests a possible return to the AMA's former policies. Finally, the JCAH's action in 1983, although found reasonable and proper, is wholly distinct from the AMA's action. JCAH was an independent body, motivated by completely different concerns. Thus, while the AMA was attempting to contain and eliminate competitors (i.e., chiropractic), JCAH was acting only to assure that responsibility for patient care in acute care hospitals remained in the hands of medical and osteopathic physicians, the only practitioners who could perform that acute care.

In challenging the need for an injunction, the AMA also contends that it is legally bound by settlements in three separate chiropractic antitrust lawsuits to the position that chiropractors are licensed limited practitioners and that no

form of professional association with chiropractors is unethical. These settlements, according to the AMA, eliminate any threat that the boycott will recur. Again, we disagree. Although the settlements may be some evidence militating against the likelihood of recurrence, it is not so strong as to reverse the district court's determination. The trial court considered this evidence, 671 F. Supp. at 1487-88, but found it was outweighed by other evidence (recited above in connection with the JCAH 1983 revisions) of a risk of a return to the AMA's former policies. *Id.* at 1488. Notably, the district court found it relevant that in all of the settlements, there was no admission of liability.

The AMA additionally argues that the permanence of its post-1977 guidelines (and hence the unlikelihood of a return to its old ways) is emphasized by the "fact" that they were undertaken entirely independently of this lawsuit. However, the district court never found this "fact"; and the district court could properly be skeptical of the AMA's "protestations of repentance and reform," *Oregon State Medical Society*, 343 U.S. at 333, 72 S. CT. at 696, especially since the AMA's change of position occurred not too long after this suit was filed in 1976.

Another factor supporting the injunction is that the AMA still vigorously maintains that its boycott activity was lawful, and has never acknowledged its past conduct's lawlessness. This coupled with the AMA's begrudging statement on professional association with chiropractors was sufficient for the district court to doubt (1) the AMA's intent to comply with the antitrust laws in the future absent an injunction, and (2) the effectiveness of the discontinuation of its illegal conduct. Importantly, the district court found that even as of the trial date, the AMA continued to respond to requests for information on chiropractic by sending outdated anti-chiropractic literature. Further, none of the AMA's policies contain any affirmative

statement that the boycott is over. An example of the AMA's begrudging and ineffective removal of the ethical bar to professional association is Opinion 3.01 of its Judicial Council. The AMA cites Opinion 3.01 as evidence that its revised guideline has eliminated the prior guidelines on chiropractic, and removed any negative references to specific licensed limited practitioners. But as the district court noted, Opinion 3.01 is entitled "Nonscientific Practitioners." [FN4] Thus, the AMA member still must look under the heading "Nonscientific Practitioners" to discover that it is now permissible to associate with chiropractors. Any beneficial effect of Opinion 3.01 likely is lost because it is buried in a category almost certain to conjure up the ethical prohibitions of the past.

FN4. In 1980, the AMA adopted a new set of "Principles of Medical Ethics" that replaced the former "Principles" that had been in place since 1957. The 1980 "Principles" provide in part:

3.0 OPINIONS ON INTERPROFESSIONAL RELATIONS

3.01 NONSCIENTIFIC PRACTITIONERS. It is wrong to engage in or to aid and abet in treatment which has no scientific basis and is dangerous, is calculated to deceive the patient by giving him false hope, or which may cause the patient to delay in seeking proper care until his condition becomes irreversible.

Physicians should also be mindful of state laws which prohibit a physician from aiding and abetting an unlicensed person in the practice of medicine, aiding or abetting a person with a limited license in providing services beyond the scope of his license, or undertaking the joint medical treatment of patients under the foregoing circumstances.

A physician is otherwise free to accept or decline to serve anyone who seeks his services, regardless of who has recommended that the individual see the physician.

3.02 OPTOMENTRY. It is not unethical for an ophthalmologist to employ an optometrist as ancillary personnel to assist him provided the optometrist is identified to patients as an optometrist. A physician may send his patient to a qualified and ethical optometrist for optometric services. The physician would be ethically remiss, of course, if before doing so he did not insure that there was an absence of any medical reason for his patient's complaint, and he would be equally remiss if he sent a patient without having made a medical evaluation of the patient's condition. Physicians may teach in recognized schools of optometry for the purpose of improving the quality of optometric education. The scope of this teaching may embrace subjects within the legitimate scope of optometry which are designed to prepare students to engage in optometry within the limits prescribed by law.

(Jt.App. 1416.) Compare the treatment of optometrists and chiropractors. One has to look in the category of "nonscientific practitioners" to learn that it is ethical to associate with chiropractors. But there is a separate section devoted to optometrists, about whom the AMA at one time had some very negative things to say. 671 F. Supp. At 1487.

Yet another factor supporting an injunction is what the district court termed the boycott's lingering effects." The court found not only that plaintiffs had been personally harmed by the boycott, but that they continued to be

personally harmed and threatened by a lack of association with members of the AMA as a result of the boycott and its lingering effects. 671 F. Supp. at 1486. The boycott, while it was in full bloom, "more likely than not affected individual decision-making by AMA members and other medical physicians in their relationship with chiropractors;" and until AMA members learn that the AMA's policies in fact have changed, AMA members' decision-making with respect to professional association with chiropractors will continue to be affected, according to the trial court. The evidence amply supported this conclusion. It is based not only on the lengthy and successful boycott, but on the begrudging nature of the AMA's more recent and lawful changes.

The district court also found a continuing injury to chiropractors' reputation as a result of the boycott. Because the AMA has never made any attempt to publicly repair that damage, the court found that chiropractors will continue to suffer injury to reputation from the boycott. 671 F. Supp. at 1486-87. The AMA's publication of its changes and its settlements were not enough, in the eyes of the district court, to overcome these harmful effects. The AMA has not convinced us that the district court was wrong in this assessment.

The AMA's strongest challenge comes to the district court's findings with respect to the lingering effects on chiropractors' incomes. The court found that the injury to chiropractors' incomes threatened to continue through the date of trial. 671 F. Supp. at 1487. For this it relied on plaintiffs' expert's analysis regarding chiropractic income levels through 1986. (Jt.App. 57.) The court found this continuing harm existed, even though plaintiffs' expert's last data point showed that chiropractors' income in 1984 exceeded that of podiatrists and optometrists – the comparable professions. 671 F. Supp. at 1487. The court did

not, however, "find," as the AMA contends, that chiropractors' incomes had actually increased in 1984; rather, it only acknowledged the expert's data in this regard. *Id.* Obviously, given its finding regarding 1986 income levels (i.e., that chiropractors' incomes continued to suffer), the court was more persuaded by the expert's income projections into 1986 regarding the lagging of chiropractors' income, than by the 1984 data. The AMA's assertion that there is no basis for the district court to, rely on the projection of chiropractors' income is baseless. There was testimony that chiropractors' incomes would still have suffered in 1986 as a result of the boycott. (Jt.App. 57.) But even without the lingering effects on chiropractors' income, there still remain the effects on professional association and reputation, which by themselves may be sufficient to show continuing harm from the boycott.

In sum, even though the district court wrongly allocated the burden of proof in deciding whether injunctive relief was necessary, its ultimate findings regarding the risk of a return to the unlawful policies, the effectiveness of the AMA's discontinuance or voluntary cessation, and the character of the past violations, without question satisfy the proper standard. W.T. Grant, 345 U.S. at 633. None of the objections the AMA raises on appeal undercuts the district court's decision to grant an injunction. That the AMA feels an injunction is not necessary (or for that matter, that even we may have felt the same had we considered the case as an original matter), is not the appropriate test. That call was for the district court to make. Id. Because the district court did not abuse its discretion, we uphold its decision to award injunctive relief. [FN5]

FN5. Based on the language in section 16 that equitable relief is available "when and under the same conditions and principles as injunctive relief . . . is granted by courts of equity. . . .," the AMA makes

a passing argument, buried in two of its 67 footnotes (two footnotes, incidentally, that are separated by seven pages of text) that the district court erred by not requiring the plaintiffs to meet all the requirements for an injunction that traditional equity jurisprudence imposes. The AMA does not bother to say what those traditional equitable requirements are, in the case of a permanent injunction, except to say that the plaintiffs had to show they had no adequate remedy at law. Nor does the AMA cite any cases concerning the propriety of a permanent injunction under § 16.

The Supreme Court has stated § 16 invokes "traditional equitable principles." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969); see also *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir. 1984). Scholarly comment has echoed this theme. *E.g.*, 2 P. Areeda and D. Turner, *Antitrust Law* § 312d (1978); Easterbrook and Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 Mich.L.Rev. 1155, 1168-69 (1982). Section 16's language indicates that traditional equity principles should apply. But while it is true that the district court stated that the plaintiffs did not have to meet all the traditional equitable requirements for an injunction, we are not convinced that this misstatement affected the court's analysis. The important point is that equitable relief is discretionary, and not automatically available to an injured plaintiff. See Areeda & Turner, *supra*, § 312d at 39. The district court did exercise discretion and did not automatically grant the plaintiffs an injunction. The court carefully weighed the AMA's conduct, the likelihood it would recur, the harm it caused and might in the future cause, and we believe, implicitly in all this, the relative hardships to

> the parties of granting an injunction. *See* 671 F. Supp. at 1484-88.
>
> It is true that the district court did not specifically find that the plaintiffs had no adequate remedy at law. The AMA baldly asserts that damages would have been adequate, but does not mention how. At any rate, at this stage in the case, we are not inclined to reverse the district court's careful decision based on an underdeveloped argument that the AMA did not even deem worthy of including under a separate heading in the text of its brief.

Anticipating this negative (for it) result, the AMA makes a last-ditch perfunctory argument. It attacks the injunction, arguing that it is unnecessarily overbroad, purports to award classwide relief in a case that was never certified as a class action, and "implicate[s] the AMA's rights under the First Amendment." None of these arguments are convincing.

[13] True enough, as the AMA observes, an injunction in a private antitrust suit should award a plaintiff injunctive relief "only to the extent necessary to protect it from future damage likely to occur if the defendant continues the unlawful antitrust conduct." *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 669 F.2d 490, 495 (7th Cir. 1982). But beyond this general principle, the AMA does not make any genuine argument that the injunction is overbroad. Instead, it simply asserts that the primary beneficiaries of the district court's order, insofar as it requires the order to be mailed to every AMA member, that it be published in the *Journal of the American Medical Association*, and that the AMA revise a national ethical publication, are the some 30,000 chiropractors in the nation as a whole who were not parties to this case. Doubtless, these other chiropractors may benefit from the mass mailing

and publication required by the district court's order. But this does not necessarily make the injunction overbroad.

The AMA's suggestion that the publications and mailings should have been limited to the four communities in which the individual plaintiffs practiced unnecessarily limits the relief, and ignores the public interest served by private antitrust suits. Such suits can effectively open competition to a market that was previously closed by illegal restraints. *National Society of Professional Engineers*, 435 U.S. at 698, 98 S. Ct. at 1368; *see also International Salt Co. v. United States*, 332 U.S. 392, 401, 68 S. Ct. 12, 17, 92 L. Ed. 20 (1947). Relief here is provided not only to the plaintiff chiropractors, but also in a sense to all consumers of health care services. Ensuring that medical physicians and hospitals are free to professionally associate with chiropractors (e.g., by the publication and mailing of the order to AMA members), likely will eliminate such anticompetitive effects of the boycott as interfering with consumers free choice in choosing a product (health care provider) of their liking. In this way competition is served by the injunction. In short, the injunction, as designed by Judge Getzendanner, reasonably attempts to eliminate the consequences of the AMA's boycott, and we will not disturb it. *National Society of Professional Engineers*, 435 U.S. at 698. [FN6]

FN6. For the same reason, we do not view the district court's injunction as improperly awarding classwide relief where no class was certified. The AMA's argument in this regard is just a rephrasing of its argument that the injunction is overbroad.

Finally, we reject the AMA's hint ("argument" seems too generous when the AMA's claim comprises but one paragraph of a 77-page brief, Max M. v. New Trier High School District No. 203, 859 F.2d 1297, 1300 (7th Cir. 1988))

that the district court's order somehow infringes on the AMA's First Amendment rights. We think the injunction as written is sufficiently tailored to avoid constitutional objection. As the Supreme Court has stated:

> [w]hile the resulting order may curtail the exercise of liberties that the [defendants] might enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. . . . The First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade. . . .' *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 502, [69 S. Ct. 684, 691, 93 L. Ed. 834 (1949)]. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

National Society of Professional Engineers, 435 U.S. at 697-98, 98 S. Ct. at 1368-69. That the injunction requires the AMA to publicize and mail copies of the order to AMA members, among other things, does not render it unconstitutional. The district court's form of injunction and method of ensuring its publication (and thus its efficacy) was a reasonable attempt at eliminating the consequences of the AMA's lengthy, systematic, successful, and unlawful boycott.

IV.

Plaintiffs' Cross-Appeal

Plaintiffs filed a cross-appeal challenging the judgments for defendants JCAH and ACP. With respect to JCAH, plaintiffs advance two separate theories of liability. First, they allege that JCAH unlawfully conspired with the AMA and participated in the AMA's boycott of chiropractors. Second, plaintiffs contend that JCAH, as a membership trade association, acted as a conspiracy each time it promulgated industry standards, and thus violated the antitrust laws in its own right. As to the latter theory of liability, plaintiffs assert that they raised it before the trial court, but that the court never ruled on it. JCAH does not contest this summarization of the events in the district court, and we accept it. Plaintiffs' theory against ACP also is two-fold. They first contend that ACP also participated in the AMA's boycott. Second, they charge that ACP is a member of the "continuing conspiracy that is the JCAH." None of plaintiffs' arguments are persuasive.

Following the first trial in this case, JCAH and ACP appealed the denial of their motions for a directed verdict. We affirmed the denial of those motions, explaining that the evidence was sufficient to permit, but not require, a jury (or, as it turned out, the trial court) to conclude that the defendants JCAH and ACP knew that concerted action in a scheme was contemplated and invited, and that both acquiesced and participated in that scheme. *Wilk I*, 719 F.2d at 233. This would have permitted a finding of liability, we reasoned, citing *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540, 74 S. Ct. 257, 259, 98 L. Ed. 273 (1954); *Interstate Circuit Inc. v. United States*, 306 U.S. 208, 226-27, 59 S. Ct. 467, 474-75, 83 L. Ed. 610 (1939).

Following *Wilk I*, the Supreme Court decided two cases, which the district court in the second trial held clarified and limited the cases relied upon in *Wilk I*. These cases were *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In *Monsanto*, the Court held that, to survive a summary judgment motion, an antitrust plaintiff needed evidence tending to "exclude the possibility" that the alleged conspirators were acting independently, *id.* at 764, 104 S. Ct. at 1471, and that the plaintiff must present "direct or circumstantial evidence that reasonably tends to prove" that the alleged conspirators "'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.*, quoting *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911, 101 S. Ct. 1981, 68 L. Ed. 2d 300 (1981). *Matsushita* reaffirmed that holding. There, the Court stated "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support an inference of conspiracy." 475 U.S. at 597 n. 21.

Applying *Monsanto* and *Matsushita*, the district court analyzed plaintiffs' claims to determine whether or not each defendant's own conduct showed membership in the AMA's conspiracy. 671 F. Supp. at 1489. [FN7] We review each defendant separately. Again, because the district court adequately set forth the facts, we only summarize them here.

FN7. The district court also held that even if JCAH were acting independently of the AMA boycott, its members (e.g., the AMA) were not responsible for the actions of JCAH. 671 F. Supp. at 1491-92. On appeal, plaintiffs tell us that this was unnecessary, and actually confused their asserted theory that

JCAH was an unlawful conspiracy in its own right. Thus, we do not pass on the propriety of the district court's ruling in this regard.

A. *JCAH*

JCAH is a not-for-profit corporation established for the purpose of setting standards and conducting health care accreditation programs in conjunction with those standards. JCAH's members include the AMA, ACP, the American College of Surgeons, the American Hospital Association, and the American Dental Association. It is governed by a board of commissioners. Twenty-one commissioners are appointed by the various members, who then appoint one public commissioner. The AMA is one of JCAH's two "dominant members" (this characterization being based solely on the number of commissioners each member is allotted).

Participation by hospitals in the JCAH's accreditation program was voluntary. Nevertheless, accreditation was important to a hospital and "loss of accreditation would be devastating." *Id.* at 1490. Since before 1958, JCAH had standards providing that hospital medical staffs were to be limited to fully licensed physicians (this was liberalized in 1970 to include dentists). *Id.*

In 1964, JCAH's director stated, in a national newsletter, that JCAH viewed chiropractors as cultists, and that hospitals that encouraged such cultists to use their facilities in any way would "very probably be severely criticized and lose [their] accreditation." Despite the similarity of this statement to later AMA efforts, the district court found there was no direct evidence that JCAH was acting in concert with the AMA with regard to this statement or its distribution; thus, it concluded this action was independent.

In 1970, JCAH completed a revision of its standards and published an accreditation manual for hospitals. The manual included "Standard X" (which was drafted by the AMA). Standard X provided that the governing board of each hospital had to assure that medical staff members practiced in an ethical manner. The accreditation manual included a source reference to the AMA's Principles. The district court found that the uncontradicted testimony was that JCAH's board of commissioners never discussed the subject of chiropractic in connection with the accreditation manual. It further found that no chiropractor participated in the accreditation manual's revision process despite the opportunity to participate. *Id.* Based on these findings, the court concluded there was no evidence that JCAH adopted Standard X in connection with chiropractors or to further the AMA's boycott. And while JCAH letters responding to inquiries from hospitals about the role of chiropractors throughout the 1970s did indicate that JCAH would withdraw accreditation of a hospital that had chiropractors on its medical staff or that granted privileges to chiropractors, the district court found these letters were completely consistent with the then-existing accreditation standards, and were "not convincing evidence that JCAH had joined the conspiracy against chiropractors." *Id.*

Finally, in 1977, JCAH revised its standards to provide that medical staff membership was to be limited "unless otherwise provided by law" to fully licensed physicians and dentists. References to the AMA's Principles were deleted. So from 1977 on, JCAH's position on chiropractors was that, as limited licensed practitioners, they could be included on medical staffs, if permitted under local law. In 1980, JCAH amended the accreditation manual by deleting Standard X.

Based on these findings, the district court found that all JCAH undertook all action from 1964 through 1980 independently of the AMA boycott. Further support for its

conclusion was the fact that JCAH's standards were largely consistent with federal law. *Id.*

Likewise, the district court found that the 1983 revisions of the JCAH standards were independent of the AMA boycott, and that the 1983 revisions were not evidence that the conspiracy against chiropractors continued into 1983. Ultimately, JCAH standards were liberalized regarding admission to medical staffs and allowance of hospital privileges to limited licensed practitioners, including chiropractors. But the standard also required that each accredited hospital's medical staff have an executive committee, the majority of which had to be medical and osteopathic physicians. (This, according to plaintiffs, is evidence that the conspiracy against chiropractors continued into 1983.)

In 1983 the AMA participated in the JCAH standards revision process. That process began in 1982 with recommendations from JCAH staff and the JCAH standard-survey procedures committee. The early recommendations were that each hospital be permitted to decide for itself, under applicable state law, which licensed health care providers would be allowed hospital privileges and medical staff membership. After initially supporting this approach, AMA members and other medical societies which wanted to ensure medical and osteopathic physician control of the medical staff and patient care in hospitals criticized the AMA. Feeling the heat of their members' criticism, the AMA changed its position and supported revisions which would ensure such control. In late 1983, JCAH adopted new standards which included the mandatory, medical physician-dominated executive committee concept.

According to the district court, the evidence supported the conclusion that JCAH members were acting to ensure that the responsibility for patient care in acute care hospitals

remained in the hands of medical and osteopathic physicians, and that this was an appropriate goal for JCAH. Patients in acute care hospitals are generally the very sick or in need of surgery. They are patients who require treatment with drugs or surgery -- i.e., treatment by fully licensed physicians (that chiropractors may not perform). This led the court to conclude that "[t]he evidence supports no conclusion other than that patient care in acute care hospitals, and the medical staffs of acute care hospitals, ought to be under the control of fully licensed physicians rather than limited licensed practitioners. I am persuaded that the JCAH members were not acting to prevent chiropractors from being admitted to hospitals or obtaining hospital privileges." 671 F. Supp. at 1493. [FN8]

> FN8. The court went on to observe that under current JCAH standards, hospitals could grant chiropractors medical staff membership, clinical privileges, admission privileges, and access to diagnostic services without fearing loss of JCAH accreditation. Authority for making individual medical staff appointments now rests with the individual hospital's governing board.

Because the court found that JCAH's acts before the 1983 revisions were independent of the AMA boycott, and that the 1983 revisions were not evidence that the conspiracy against chiropractors continued into 1983, it concluded that plaintiffs failed to prove that JCAH was a member of the conspiracy. Id. at 1494.

1. JCAH as Conspiracy

[14][15] Plaintiffs' first theory on appeal is that JCAH, as a trade association, "acts as a conspiracy or combination every time it promulgates industry standards [which unreasonably restrain competition]." But a trade association

is not, just because it involves collective action by competitors, a "walking conspiracy." *Consolidated Metal Products, Inc.*, 846 F.2d at 293-94. There is no evidence that JCAH's accreditation program "is merely a ploy to obscure a conspiracy" against chiropractors. *Id.* at 294. And plaintiffs' arguments for a separate antitrust violation with respect to JCAH standing alone are unpersuasive.

The most serious problem with plaintiffs' theory is that they did not prove any actual or threatened antitrust injury directly traceable to the alleged antitrust violation which would be redressed by the issuance of an injunction against JCAH. *See Cargill, Inc. v. Monfort of Colorado Inc.*, 479 U.S. at 122, 107 S. Ct. at 495. Thus, even if this particular claim was not expressly addressed by the district court, plaintiffs' claim still must fail. In support of their contention that they suffered actual injury, plaintiffs offer "evidence" of examples of when each plaintiff was denied privileges or medical staff membership at certain hospitals. But after thoroughly reviewing the record, we conclude these examples do not show any connection to JCAH or its Standard X. (Jt.App. 13-14; 15-17; 89-100; 181; 182-87; 190-91; 380-81; 420; 672-81; 773-74; 851; and 934-35.) Because we find no antitrust injury occurred as a result of the 1970 Standard X, we necessarily conclude that there was no continuing JCAH boycott as a result of the revisions in 1983. [FN9]

FN9. Plaintiffs claim, for the first time in their reply brief, that the 1983 standards themselves violate the antitrust laws. The district court, however, stated that plaintiffs were not claiming that the 1983 JCAH standards violated the antitrust laws. 671 F. Supp. at 1492. Whether they did or did not raise the issue in the district court, there is no question that the plaintiffs' initial appellate brief did not raise this issue. Rather, plaintiffs argued that "The JCAH 1983 Revisions Continue[d] The Boycott." In this regard

they stated, "only one conclusion is possible: the JCAH M.D. domination standard *perpetuates* the boycott" (emphasis added). We think it plain that plaintiffs made their claim that the 1983 revisions themselves were unlawful for the first time on reply. We thus will not address the argument. *See Gold v. Wolpert*, 876 F.2d 1327, 1331 n. 6 (7th Cir. 1989).

2. JCAH as Member of the AMA Boycott

[16] Plaintiffs' second theory of antitrust liability against JCAH contends that JCAH was a member of the AMA's boycott. In this regard, plaintiffs contend that JCAH knew the AMA boycott was contemplated and that it acquiesced and participated in that scheme. As stated above, the *Monsanto* and *Matsushita* cases hold that to establish liability under this theory, there must be evidence that at least tends to exclude the possibility that the alleged conspirators were acting independently, rather than pursuant to "'conscious commitment to a common scheme designed to achieve an unlawful objective'," *Monsanto*, 465 U.S. at 764, 104 S. Ct. at 1471, quoting *Edward J. Sweeney & Sons*, 637 F.2d at 111. Plaintiffs, however, argue that *Monsanto* and *Matsushita* are inapplicable to this case because here we are dealing with a horizontal combination, and because there is "direct evidence" of a conspiracy in this case. We agree with the district court, however, that this case should be governed under the standards set forth in *Monsanto* and *Matsushita*. We have stated before, "[t]he actual label placed on the conspiracy is a 'pedantic distinction,' as the Monsanto standard applies regardless of which label is attached." *Valley II*, 822 F.2d at 660 n. 5. And plaintiffs point to no "direct evidence" of the conspiracy.

At best, plaintiffs make only a perfunctory argument that JCAH knowingly adhered to and participated in the AMA's unlawful boycott. Nowhere do they attempt to show

just how the district court made erroneous findings of fact. Rather, they point to the fact that JCAH adopted Standard X (after being manipulated by the AMA in doing so) to establish JCAH's participation in the boycott. But the district court found that JCAH's board of commissioners never discussed the subject of chiropractic, and that the subject was never raised in connection with the 1970 revisions of the accreditation manual. It also found that no chiropractor participated in the revision process despite having an "extensive opportunity" to do so. Thus, the court held "[there] was no evidence that JCAH adopted Standard X in connection with chiropractors or in furtherance of the AMA boycott." 671 F. Supp. at 1490. Plaintiffs' urgings to the contrary are nothing but a bald invitation to substitute our judgment for the district court's. Consistent with our prior treatment of this issue in *Wilk I*, 719 F.2d at 233, the evidence may have been sufficient to find that JCAH participated in the conspiracy, but it did not require such a finding. The district court was entirely within its right to find no conspiracy between JCAH and the AMA.

As evidence of JCAH's participation in the conspiracy, plaintiffs also point to the district court's finding that JCAH cooperated with the AMA in connection with the distribution of an article titled "The Right and Duty of Hospitals to Exclude Chiropractors from Hospitals." Apparently, they believe this carries the day in establishing JCAH's participation in the boycott. We disagree. As the district court found, the JCAH's use of the cited article was in connection with inquiries from hospitals about the role of chiropractors in hospitals. 671 F. Supp. at 1490. The court also found that the JCAH letters were "completely consistent with the then-existing accreditation standards." *Id.* We thus agree with the district court that this was "not convincing evidence" that JCAH participated or joined in the AMA's conspiracy against chiropractors. *Id. Cf. Monsanto*, 465 U.S. at 762, 104 S. Ct. at 1470 (communication about prices and

marketing strategy does not alone show that distributors are not making independent pricing decisions). [FN10]

> FN10. Plaintiffs make one additional claim. This case, they tell us, fits neatly within the framework of *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982). They assert that because the trial court found the AMA manipulated the JCAH and caused it to adopt Standard X (as well as circulating the AMA's "Right and Duty of Hospitals to Exclude Chiropractors"), that JCAH was liable because it allowed itself to be manipulated and used as a mechanism through which the AMA enforced its anti-competitive scheme. Plaintiffs cite *Hydrolevel* in the portion of their argument dealing with JCAH's alleged knowing adherence and participation in the AMA's boycott. But *Hydrolevel* does not address the conscious parallelism issue. *Hydrolevel* speaks of an association's liability in its own right, not as a member of another's unlawful conspiracy. We thus believe *Hydrolevel* is inapplicable to this case.

B. *ACP*

The analysis and outcome would be much the same for ACP as for JCAH, at least so far as its alleged participation in the AMA's boycott is concerned. ACP's alleged membership or participation in the AMA's unlawful boycott, for example, is also judged under the *Matsushita* and *Monsanto* standards. Here, though, we must digress briefly to address a problem with plaintiffs' argument. Their claims in this respect seem at best to be confused. In their opening brief, they refer to the ACP's participation in "the boycott," and argue that the district court's finding that the ACP did not participate in any boycott of chiropractors is clearly erroneous. The district court's findings in this regard

concern whether or not ACP was a member of or participated in the AMA's conspiracy. 671 F. Supp. at 1471, 1489, 1494-96. It is obvious from the district court's opinion, and from plaintiffs' opening brief, that "the boycott" referred to is the AMA's unlawful boycott. But in their reply brief, plaintiffs say it is "irrelevant" whether or not ACP conspired with the AMA. In other words, they are arguing that the district court's finding that ACP was not a member of the AMA's boycott, 671 F. Supp. at 1494-96, is not at issue on this appeal. We will take them at their word; that issue is now foreclosed against them.

Apparently, then, plaintiffs are claiming, as they did with JCAH, that the ACP as a membership association engaged in concerted activity through various acts. That is, the ACP is liable under § 1 of the Sherman Act in its own right. Plaintiffs also present a second theory of liability: that the ACP, as a member of the JCAH, is liable for the unlawful acts of that organization because it knowingly participated in and ratified those acts.

1. ACP as a Conspiracy

There is no evidence that ACP itself engaged in an unlawful boycott of chiropractors. Plaintiffs point to the ACP's bylaws which provided that the purpose of the ACP included "preserving the history and perpetuating the best tradition of medicine and medical ethics." Because of the fact that many of the ACP's members were also AMA members, plaintiffs argue that this veiled reference to ethics somehow furthered an ACP boycott. But the ACP never adopted the AMA's Principles (including former Principle 3), and never required its members to subscribe to those principles. 671 F. Supp. at 1494. Also, the ACP never had a code of ethics. In 1984 it published the American College of Physicians Ethics Manual. But this was not a code or set of regulations. Rather, it was an effort to address major contemporary

issues confronting all physicians and merely attempted to stimulate debate on medical ethics. The manual stated nothing about chiropractic or about what remedies are or are not "scientific." Indeed, as the district court found, the manual appears to leave the individual physician free to make his own judgment as to the kinds of treatment he should participate in and in his relations with other licensed health practitioners. 671 F. Supp. at 1494.

The plaintiffs rely on two additional documents to establish an ACP boycott. The first grew out of a September 1978 meeting of the ACP's board of governors. (The board of governors was not the ACP's policymaking body.) The Board at that meeting accepted a report by an ad hoc committee appointed to suggest what might be done to promote the ACP's policy toward chiropractic. According to the district court, the minutes of that meeting reflect that:

> The committee agreed unanimously that ACP should be concerned about and oppose any action which would include chiropractic among the scientifically-based modes of medical care and which would give chiropractors direct access to the diagnostic facilities of hospitals.

671 F. Supp. at 1495. Plaintiffs also point to a resolution adopted by the board of governors which provided, among other things:

> (2) the governors should remain alert to efforts of chiropractors to gain access to radiographic and clinical laboratory diagnostic facilities in their regions and keep ACP headquarters informed of such developments;

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(8) the governors should alert colleagues in other disciplines to the efforts of chiropractors to gain access to radiographic and clinical pathology diagnostic facilities; and

(9) the governors and the college members in their regions should discuss these matters with their county and state medical societies and with their representatives to the house of delegates of the AMA.

671 F. Supp. at 1495-96.

Although the district court found that many parts of the resolution related to matters protected under the Noerr-Pennington doctrine, not everything included was protected. (This is not at issue on appeal.) What is important is that the district court found that the resolution contained no call for the participation of ACP or its members in the AMA's boycott against chiropractors, "or [in the] ACP's own boycott." 671 F. Supp. at 1496. Continuing, the court explained "[m]oreover, the resolution was never implemented . . . and there is no evidence that ACP members were called upon to cooperate in effectuating ACP's 'policy' on chiropractic." *Id.* Plaintiffs do not show how the district court's findings are clearly erroneous; rather, they just interpret the document differently. It is well established by now, however, that we do not substitute our view of the facts for the district court's on appeal. After reviewing the evidence, we are not left with the "definite and firm conviction" that the district court made a mistake in interpreting this evidence. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).

Plaintiffs also point to a joint document in which the ACP participated, titled "Status Report on Chiropractic Lawsuits" to establish an ACP conspiracy. The report was distributed to ACP members. It does contain an admission that Principle 3 forbade association with chiropractors. But, as the district court explained, this admission was irrelevant as to ACP which had not adopted the AMA's Principles, and which did not have a medical ethic similar to Principle 3. We agree. Again, plaintiffs just offer their different interpretation of the document, which has never been enough to carry the day when reviewing a district court's factual determinations. We see no error. [FN11]

FN11. Plaintiffs also argue that the district court erroneously "excluded evidence [which] proves ACP's knowing intent to exclude chiropractors." (Plaintiff's reply br. at 23.) What plaintiffs are getting at is that certain evidence was held by the district court to be protected under the Noerr-Pennington doctrine. The first involved a letter written to a governmental agency (the National Institute of Neurological Diseases and Strokes (NINDS)) in connection with a government project (the study of chiropractic). Plaintiffs claim this was not protected under the Noerr-Pennington doctrine because blind copies were sent to the AMA's Committee on Quackery and other medical societies. They ignore the fact, however, that the district court made an alternative holding with respect to this letter. It stated that even if the letter was not protected, it was obvious that it expressed only the author's own opinion as to what action the ACP's board of regents (its policy-making body) might take in the future, and that it was not the act of the ACP endorsing the AMA chiropractic policy statement. The court also found there was no evidence that ACP had knowledge of the activities of the Committee on

Quackery. Thus, we do not need to address whether or not this document was protected under the Noerr-Pennington doctrine, as the alternative ground is both sound and unchallenged.

Plaintiffs make two perfunctory and undeveloped contentions with regard to "exclusion" of "boycott activity." But neither of these amounts to an "argument" under Fed. R. App. P. 28(a)(4). Thus, we will consider neither.

2. ACP Participation in JCAH's Conspiracy

Finally, plaintiffs contend that ACP is a member of "the continuing conspiracy that is the JCAH." But since we have held JCAH did not violate the antitrust laws, ACP could not be liable for participating in JCAH's acts. Thus, plaintiffs' theory that ACP is liable for participating in JCAH's conspiracy fails.

V.

Conclusion

We affirm the district court's finding that the AMA violated § 1 of the Sherman Act by conducting an illegal boycott of chiropractors, and the district court's decision to grant an injunction against the AMA. In finding liability, the court did not improperly rely on evidence of conduct protected by the Noerr-Pennington doctrine. The district court's factual findings supported its finding that the AMA's boycott was illegal under the rule of reason, and those findings were not clearly erroneous. The district court also did not clearly err in finding that the AMA did not meet its burden of proving its patient care defense, and in finding that the AMA's boycott caused the plaintiffs past injury and the threat of future injury. The court did not abuse its

discretion in imposing an injunction on the AMA. The court's factual findings supported its exercise of equitable discretion, and the injunction was not overbroad.

We also affirm the district court's findings that JCAH and ACP did not participate in the AMA's boycott, or in any other way violate § 1 in their activities concerning chiropractors. The plaintiffs' theory that JCAH itself conspired by setting standards fails because the plaintiffs failed to prove that the JCAH's actions caused them any actual or threatened injury. The court's finding that JCAH did not participate in the AMA's conspiracy was not clearly erroneous. The plaintiffs have waived any contention that ACP participated in the AMA's conspiracy by claiming that any such participation was "irrelevant." The district court did not clearly err by finding that ACP did not conduct its own conspiracy, and since JCAH did not violate § 1, ACP could not be liable for participating in JCAH's actions.

The district court's decision is

AFFIRMED.

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